INTERNATIONAL COUNCIL OF SHOPPING CENTRES

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LEGAL UPDATE

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Okotoks Square Inc v Cora Franchise Group Inc, 2022 ABQB 254

Facts

This was an appeal from a Master's decision granting summary dismissal of the landlord's claims.

The claim concerned an attempt by the landlord to pierce the corporate veil of the shell corporation tenant and hold the tenant's parent company liable for breach of the lease. The premises were leased to a Cora's breakfast restaurant which began experiencing financial difficulties. When the franchisee advised the landlord that it could not meet its obligations, the landlord reached out to the franchisor ("Cora") to discuss keeping a restaurant in the space. Cora advised the landlord it would operate a restaurant "corporately" for a time until a new franchisee could be found, and that it would incorporate a new entity to act as the tenant "for tax and equipment purposes, etc" (the "Tenant").

In the course of negotiations, the landlord sent Cora several draft leases. One had Cora itself as the tenant. Another had Cora as a guarantor of the Tenant. Neither was signed, and the final version of the lease had only the landlord and Tenant as parties. Cora advised the landlord that the Tenant's sole shareholder was on an advisory board at Cora and a member of Cora's founding family.

The Tenant operated out of the premises for 6 months. In that time, Cora oversaw all aspects of the Tenant's daily operations including staffing. Cora advanced funds to the Tenant to pay its rent, as the Tenant never made enough income to do so on its own. After 6 months, Cora advised the landlord that it would no longer be propping up the Tenant. The landlord obtained default judgment against the Tenant, and then also claimed against Cora on the basis that it believed Cora to be liable for the rent arrears.

Issues

1) Was Cora liable for the Tenant's rental arrears by way of
   a) Piercing the corporate veil;
   b) Oppression;
   c) Misrepresentation;
   d) Agency;

Held

1) Was Cora liable for the Tenant's rental arrears by way of
   a) Piercing the corporate veil;

The test for piercing the veil between corporate parties is whether the one is the "mere puppet" of the other, and where the subsidiary was incorporated for a fraudulent or improper purpose as a shell for improper activity, citing *Aubin v Petrone*, 2020 ABCA 13. This is alternately described as a corporation being a "sham, cloak, or alter ego" for another party.

The Court held that Cora clearly had sufficient control of the Tenant such that it was a mere puppet, since it controlled every aspect of the Tenant's business and the Tenant only had an absentee director.

The landlord argued that Cora had misled it about the purpose for the Tenant's incorporation by stating that it was for "tax and equipment purposes, etc" when it really intended to rely on the Tenant as a liability shield. Further, Cora's assertion that the Tenant's director was on an advisory board at Cora was admitted to be untrue. However, given that both parties were sophisticated entities, the Court held it was not Cora's responsibility to explain to the landlord that it would be able to rely on the corporate separateness of the Tenant. The landlord itself was a subsidiary of a real estate holding company.

The previous drafts of the lease which included Cora as a party or indemnifier, and the absence of such a provision in the signed lease, defeated the landlord's claim. The Court found that Cora had negotiated itself out of the lease, despite the landlord's obvious desire to have it as a guarantor. The Court also found that Cora relying on the Tenant as a liability shield despite having been primarily incorporated for tax purposes was not a misrepresentation. Also, the fact that the Tenant was admitted to be a shell corporation did not mean it was incorporated for an improper purpose. The landlord knew the Tenant had been incorporate recently for the sole purpose of acting as tenant under the lease, and where shell corporations are not used to mislead they are not inherently suspicious.

The Court declined to pierce the Tenant's corporate veil.

b) Oppression;

The landlord attempted to use the oppression remedy in the Alberta Business Corporations Act to hold Cora liable for the Tenant's breach of contract.

The landlord claimed standing for this remedy as a creditor of the Tenant, and the Court noted that creditors must receive Court approval to have the necessary standing. The Court denied the landlord standing, citing PricewaterhouseCoopers Inc v Perpetual Energy Inc, 2021 ABCA 16 for the rule that simple creditors should not be able to use the oppression remedy where other relief is available to them. Further, the landlord was not a creditor of Cora, only of the Tenant, since the Tenant's corporate veil had not been pierced. Given those circumstances, the landlord was too far removed to be proper person to claim oppression.

The Court went on to consider the merits of the oppression claim in the alternative. Oppression concerns conduct that is "coercive, abusive, or in bad faith". The landlord argued that Cora had induced the Tenant to breach the lease by withholding funding to the Tenant, knowing that doing so would likely cause a default. The Court held that this was not inducing a breach since Cora had no obligation to guarantee the Tenant's solvency. The fact that Cora was not a party to the lease meant that any payments it made to the Tenant during the term of the lease were purely voluntary. It was not required to prop up a failing restaurant indefinitely.

However, the Court did preserve a part of the claim that related to the director of the Tenant's potential personal liability. Cora had declined to answer undertakings related to where certain funds were disbursed to when the Tenant was dissolved. The Court, unable to say definitively that they were not disbursed to a director's personal benefit, stated that if the standing issue were not present then the oppression claim as against the Tenant's director would be a genuine issue requiring a full trial.

c) Misrepresentation;

The landlord argued that Cora's representation to run the restaurant "corporately" during the lease implied that it was running the operation itself, in its own capacity. However, the Court found that Cora was candid about the parent-subsidiary relationship it had with the Tenant and that in any event this language was at best ambiguous rather than a positive statement on which the landlord could rely. The Court also noted that it would be contrary to the parol evidence rule to allow a representation to directly contradict the terms of the lease (namely, who was a party to the contract).

d) Agency;

Finally, the landlord attempted to argue that the Tenant was acting as agent for Cora. However, Cora had been clear about the corporate relationship it had with the Tenant. Further, it was Cora who had negotiated directly with the landlord and none of the individuals engaged in that negotiation were formally affiliated with the Tenant. The Tenant had not really "acted" at all, let alone in a way that could bind Cora.

Conclusion

The landlord was unable to enforce the lease against Cora on any of the bases it advanced.

Dhami v Redekop, 2020 BCSC 630

Facts

This case concerns a dispute over whether a particular document was a valid a lease. The parties were rival owners of two tree and shrub nursery businesses, and the premises in question was owned by one of the businesses. The purported lease, however, was signed only by the individual landlord owners in his personal capacities (the "Landlord"), without reference to the business that actually owned the property (the "Corporation"). The tenant argued that the Landlord had signed in his capacity as agent for Corporation. The tenant sought a declaration that the lease was valid and in effect, as well as for negligent misrepresentation by the Landlord for allegedly representing that he owned the property in his personal capacity.

Issue

Was the Corporation bound by the terms of the challenged document as a valid lease?

Analysis

Was the Corporation bound by the terms of the challenged document as a valid lease?

The plaintiff submitted that was bound to the terms of the lease on the basis that the Landlord acted as agent of the Corporation when executing the challenged document, the agreement in the challenged document was ratified, and that the landlord led the plaintiffs to believe that they would have tenancy rights to the subject lands, and as such, were estopped from removing them from the land.

The tenant described negotiations leading up to the signing of the purported lease, including an unsuccessful attempt to purchase (rather than lease) the premises. The Landlord denied ever having such discussions.

The Court found that the parties had intended for the challenged document to bind the owner of the lands as stated in the document's recitals. The document contained representation as to ownership of the lands, which the defendant accepted when he signed it. The defendant was acting as an agent for his business, so the agreement was binding on it despite the fact that the business was not listed as a party to the contract. The Court held that the challenged document should be rectified to read as the Corporation as being a lessor and that there was an expression of intent to make an assignment at the time of the agreement.

Held

The Court found that the Landlord was acting as an agent for his business when he entered into the lease. The Court declared that the lease was a valid and enforceable lease of the subject lands.

The tenants were awarded the sum of $100,000 for breach of contract. The tenant's claim based upon the tort of conspiracy was determined to be unproven and was dismissed. The tenant's claim for damages for loss of business reputation and goodwill was dismissed for lack of evidence.

Saopzhnik et al. v Prall et al., 2020 MBQB 23, aff'd 2021 MBCA 51

Facts

This case dealt with a real estate agent accused of fraud and misrepresentation in a commercial real estate deal.

The Plaintiff was a hotel owner and developer who met with the Defendant realtor to discuss the Defendant realtor acting for the Plaintiff in connection with leasing some CRUs on lands owned by the Plaintiff. At the time, the Defendant was acting for Artis REIT in leasing CRUs located on a property in Winnipeg known as the Linden Ridge Shopping Centre (the "shopping centre"). In his discussions with the Plaintiff, the Defendant indicated that he was aware that, adjacent to the shopping centre, there was a 12-acre property owned by Walmart (the "Walmart property"), which the Defendant believed Walmart was going to sell, although it was not then on the market. The Defendant sent some information on the Walmart property to the Plaintiff.

The next meeting between the Plaintiff and Defendant was called to discuss other leasing arrangements. However, at that meeting, the Plaintiff raised the matter of the purchase of the Walmart property and asked the Defendant to represent the Plaintiff in the acquisition of the Walmart property (but not the future leasing of that property because he understood that would create a more direct conflict with the Defendant leasing the adjacent shopping centre owned by the Defendant's existing client, Artis REIT). The Defendant advised that before acting for the Plaintiff in this manner, he would still have to clear conflicts with Artis REIT.

The Defendant set out to arrange a meeting with Artis REIT to discuss the conflict of interests. The meeting ended with Artis REIT letting the Defendant know that they would consider the conflict and advise.

The Defendant then learned that Artis REIT planned to make an offer to purchase the Walmart property and the Defendant later presented the offer to purchase the Walmart land on behalf Artis REIT. At that time, the Defendant realtor confirmed with the Plaintiff that he could not act for him.

The Plaintiff retained another realtor to make an offer for the Walmart property. This offer was significantly less than the recommendation of the Plaintiff's realtor and was not accepted. Artis REIT's offer was accepted.

The Plaintiff brought an action against the Defendant realtor for damages on a prospective basis.

Issues

Was the Defendant realtor acting as an agent for the Plaintiff?

Held

Agency relationship could arise by direct action or by implication.

Lower Court

There was no direct agency relationship and no written agreement between the Plaintiff and the Defendant realtor. There was no evidence in the circumstances that suggested otherwise. The conversation between the parties had never deviated from this understanding. The Plaintiff did not enter into an oral agreement with the Defendant realtor where the Defendant realtor would act as the Plaintiff's purchasing agent for the land. The Plaintiff was informed by the Defendant realtor that he could not act until he had cleared any conflicts of interest and, subsequently, the Defendant realtor advised that he could not act for the Plaintiff.

There was also no evidence that Artis REIT obtained any advantage as a result of the Defendant realtor's actions. The evidence did not show that Artis REIT had received any additional information from the Defendant realtor that was not already publicly available.

The trial judge found that there was also no implied agency relationship. The Plaintiff was a sophisticated business party, and he understood that any agency relationship was subject to the Defendant clearing conflicts. There was no duty fiduciary owed to the Plaintiff.

Court of Appeal

The Plaintiff **appealed**. The Court of Appeal noted that the communication between the parties made it clear that they did not see themselves in an agency relationship until any conflict of interest was resolved. The trial judge reviewed the evidence of the parties' communication in great detail and found that the Plaintiff was a sophisticated real estate investor, and that he understood the issues of conflict of interest. The Appeal was dismissed.

Price Security Holdings Inc v Klompas & Rothwell, 2018 BCSC 129

Facts:

Fort Quadra Holdings Ltd. ("**Fort Quadra**") owned a property (the "**Property**") on which a commercial building was built (the "**Building**"). The Tenant had occupied office space in the Building since 1985. On July 29, 2002, K & R executed a lease agreement (the "**2002 Lease**") with Fort Quadra for a term of five years and four months, commencing on September 1, 2002 and ending on December 31, 2007 for office space (the "**Premises**"). Rent was to be paid on a monthly basis and was set at a fixed rate for each year of the Lease.

The Lease also contained an overholding clause which stated:

> "That if that Tenant shall continue to occupy the Leased Premises after the expiration of this Lease without any further written agreement and without objection by the Landlord, the Tenant shall be a monthly tenant at a monthly base rent equal to 150% of the monthly installment of Annual Base Rent payable by the Tenant as set forth in Article 4 during the last month of the Term and (except as to length of tenancy) on and subject to the provisions and conditions herein set out." (at para 9)

The Lease also contained an option to renew the Lease for five years, as long as the Tenant gave six months of notice prior to the expiry of the initial term.

In 2006, Fort Quadra was acquired by an entity connected to the Landlord. In June 2007, six months before the expiry of the 2002 Lease, an employee of Price's Alarms Systems Ltd. provided the Tenant with an extension agreement pursuant to its original terms. The Tenant refused, but stated that it would consider a new agreement at market rates and no longer needed some of the space it had been leasing. The Tenant sent the extension agreement back unsigned. The Lease expired without any extension agreement, after which the Tenant continued to occupy the Premises and pay the rent rate previously in effect.

The Tenant was approached by the Landlord three more times, in April 2008, October 2008, and late summer of 2012. Each time, the Landlord's offer to sign an extension agreement or enter into a new lease was declined by the Tenant for the same reasons as before. Throughout this time, the Tenant continued to occupy the Premises and pay the rent in effect under the 2002 Lease.

On December 31, 2009, Fort Quadra and the Landlord signed a declaration which listed Fort Quadra as "Bare Trustee" and the Landlord as "Beneficial Owner" of the Property (the "**2009 Declaration**").

In July 2014, the Tenant stopped paying rent and complained of certain management fees and charge-backs.

On July 15, 2016, the Landlord sold the Property. On July 21, 2016, the Landlord emailed the Tenant to inform it that additional arrears were owed pursuant to the 150% overholding rent provision in the 2002 Lease.

The Landlord commenced proceedings for outstanding rent arrears and applied for judgment by summary trial. The Landlord and Fort Quadra all disclaimed interest in the amounts alleged to be owed by the Tenant.

Issues:

1. What governed the relationship between K & R and Fort Quadra after December 31, 2007?
2. Does the Landlord have standing to bring this claim?
3. If yes, is overholding rent owed to the Landlord?
4. If yes, are rent arrears owed to the Landlord?
5. Is the claim statute barred?
6. What is the appropriate interest and costs?

Held:

1. What governed the relationship between K & R and Fort Quadra after December 31, 2007?

After the expiry of the 2002 Lease on December 31, 2007, the Tenant did not give notice to exercise its option to renew but continued to occupy the Premises and pay rent until July 2014, despite declining to sign any agreements multiple times because it wanted to pay less.

Following *Aim Health Group Inc. v. 40 Finchgate Ltd. Partnership*, 2012 ONCA 795 (Ont. C.A.) at para. 95 and *Orion Interiors Inc. v. State Farm Fire and Casualty Co*., 2015 ONSC 248 (Ont. S.C.J.), the Court ruled that the relationship between the Tenant and the Landlord was subject to a new tenancy agreement on a month-to-month basis with the same terms as the 2002 Lease (the "**2008 Lease**"). The Court came to this conclusion after considering that the Tenant continued to occupy the Premises after the 2002 Lease expired, the Landlord did not object to the Tenant's occupation and continued to collect rent, and the parties did not agree to any other arrangements.

2. Does the Landlord have standing to bring this claim?

The Tenant submitted that the Landlord was a stranger to the 2002 Lease and therefore the doctrine of privity precluded the Landlord from bringing a claim for rent arrears. The Court considered the timeline of events to deduce the relationship between the parties. Particularly, on December 31, 2009, the Landlord was declared "beneficial owner" of the Property after it acquired Fort Quadra.

Citing *Greenwood Shopping Plaza Ltd. v. Neil J. Buchanan Ltd.*, [1980] 2 S.C.R. 228 (S.C.C.) ("***Greenwood***") at 236, the Court stated that the doctrine of contractual privity bars anyone but the parties to a contract to be bound to it or entitled to its benefits. However, the Landlord submitted that there were three exceptions to the doctrine of privity according to *Greenwood* and *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd*., [1999] 3 S.C.R. 108 (S.C.C.):

- Agency exception: one of the parties to the contract entered into it as an agent of the third party;
- Trust exception: one of the parties to the contract entered into it as the third party's trustee; and
- Principled exception: the parties entered into the contract intending to extend the benefit in question to a third party seeking to rely on the contractual provision, and activities were performed by the third party which were contemplated as coming within the scope of the contract.

The Court rejected all of the principled exceptions in this case. The Court determined that the 2002 Lease was contracted before the Landlord was incorporated, and there was no authority to support that the agency exception applied to a contract formed before the contracting party became an agent or trustee of the principal. Therefore, neither the agency exception nor the trust exception applied. Further, based on the timings of the 2008 Lease, the incorporation of the Plaintiff, and the 2009 Declaration, the Court was not satisfied that the Tenant intended to extend the benefit of the 2008 Lease to the Landlord.

The Court then considered whether the Landlord still had a beneficial interest in the Property. The Court determined that the Landlord did not intend to transfer its entire beneficial interest in the Property to the purchaser after reviewing the 2016 Purchase and Sale Agreement as a whole, and taking into account its purpose and the nature of the relationship created by it. The 2016 Purchase and Sale Agreement was clear that the purchaser was entitled to income relating to the Property from and including the closing date, but not before. Further, the 2016 Purchase and Sale Agreement noted that the Landlord "shall not be credited with arrears of rent and other charges owed by the Tenant" but would be able to sue for the recovery of rent arrears. The Court stated that this language indicated that the Landlord did not intend to transfer its right to arrears owed in the Property. The Court rejected language in the 2016 Direction to Trustee, which stated that Fort Quadra would transfer its "entire beneficial ownership interests of [the Landlord] in and to the Property," because it was directly inconsistent with the 2016 Purchase and Sale Agreement, and it was more accurately characterized as a grant or assignment of an equitable interest instead of a contract.

3. If yes, is overholding rent owed to the Landlord?

The Tenant submitted that the Landlord was estopped by conduct from enforcing the 150% rent obligation in the overholding tenant provision, citing *Beavis v. Beavis*, 2014 BCSC 590 (B.C. S.C.) at para. 45. The Court considered that the Landlord continued to collect rent from the Tenant at the previously charged rate for more than six years. There was no evidence that the Landlord ever requested additional payments for overholding rent until July 21, 2016. The Court deemed that it was reasonable for the Tenant to infer that this practice was sufficient to satisfy its rent obligations, and that it provided utility for both parties.

As a result, the Court determined that the Landlord's representations were made with the intention to be acted upon by the Tenant and that it induced the Tenant to believe that the rent obligations had been satisfied during the overholding period. Further, the Court noted that, based on the Tenant's evidence, if the Tenant had known that it was going to be charged 150% rent for

overholding, it would not have stayed on the Premises or would have demanded a new lease at a market rate.

4. *If yes, are rent arrears owed to the Landlord?*

The Tenant submitted that the rent rate under the 2002 Lease was significantly above market rate and in excess of what was required to finance leasehold improvements and renovations on the Premises, therefore it had overpaid the Landlord from January 1, 2008 to July 2014 and was entitled to an equitable set-off against any amount it may owe.

The Court rejected this argument as the relationship in 2008 to 2014 was governed by the 2008 Lease and there was no provision in the 2002 Lease which supported that the Landlord promised to lower the rent upon recouping improvement costs.

5. *Is the claim statute barred?*

The Court found that acknowledgement of liability occurred less than two years before the notice of civil claim was commenced and the claim was not statute barred.

6. *What is the appropriate interest and costs?*

The Landlord submitted that interest should be calculated at a rate pursuant to the terms of the 2002 Lease. Considering that the parties' relationship was governed by the 2008 Lease, which had adopted the terms of the 2002 Lease, the Court agreed with the Landlord.

Conclusion:

The Landlord's claim for enforcing 150% rent obligation for the Tenants overholding was estopped by the Landlord's conduct. However, the Landlord was entitled to rent arrears in amount of $144,094.29. Interest was calculated at prime plus 3% and the Court awarded solicitor-own client costs in favour of the Landlord pursuant to the 2002 Lease.

International Fitness Holdings Inc (Re), 2021 ABQB 469

Facts
This decision related to bankruptcy proceedings under the *Bankruptcy and Insolvency Act*. The central issue was whether a commercial lease was equitably assigned. The tenant's assets had been acquired by a successor, but the lease was not explicitly included in that acquisition. A lease assignment was contemplated but not pursued. The successor was then the subject of a proposal proceeding under the *BIA*. A potential purchaser was found for the successor, but that purchase was contingent on being able to acquire the lease, so the successor (through the proposal trustee) brought an application to declare that the lease had been equitably assigned.

Issue
Had the lease been equitably assigned to the successor?

Held
Had the lease been equitably assigned to the successor?

For the elements of equitable lease assignment, the Court relied on and heavily quoted from various case law, as described below.

In *Bentall*, the court held that merely occupying the premises and paying rent was not enough. Factors must be present to indicate that the parties knowingly decided to treat each other as tenant and landlord. Examples included discussions about lease renewal between subtenant and landlord, written and oral communications indicating the parties regarded each other as landlord and tenant, acknowledging notice and terms of an unregistered sublease, whether the landlord could have demanded that the tenant vacate at any time. Actual occupancy, in short, does not necessarily confer legal possession.

In *Smiles First*, the lease had terms that required landlord consent before it could be subleased, and this consent was not given. A landlord accepting rent, while the parties were engaged in settlement negotiations, did not constitute an intention by the landlord to treat the sublease as valid.

In *H De Groot Real Estate v Scribes Inc*, 2018 ONSC 870, the landlord argued the lease was equitably assigned to the tenant's parent company when it stepped in to make rent payments after the tenant fell into financial difficulties. It also argued the tenant's parent had directed work on the premises. The court disagreed. A parent paying rent of a subsidiary did not imply assignment, and the work to the premises was found to be directed by the tenant itself. The conduct did not imply assignment.

Spring Garden Holdings Ltd v Ryan Duffy's Restaurants Ltd, 2010 NSSC 71 found no equitable assignment based on a lack of evidence of the parties intention to do so, holding there must be evidence of such. An affiliated corporation paying rent is not sufficient evidence of such intention, and in any event the lease prevented assignment without landlord consent.

Matharu v Mid-West Sportswear Ltd, 2002 SKQB 522 found that there was equitable assignment of the lease on the basis that a corporation related to the tenant (with the same directing minds) had paid rent, occupied the premises, gave notice that it was vacating, and managed it's affairs as though it was an assignee of the lease.

Levine v Davies, [1998] OJ No 140 (CA) explicitly held that acts of part performance could support an equitable assignment. In that case, the acts were: taking possession and operating under the name authorized in the non-profit assignee's constitutional documents, sending rent cheques in the assignee's name, the landlord sending correspondence to the assignee, and evidence that the parties intended the non-profit corporation to become the eventual tenant.

Lankester & Son Ltd v Rennie, [2014] EWCA Civ 1515 identified additional factors indicating equitable assignment such as the assignee paying the rent and insurance, securing a new monthly payment regime, directing repairs, and conducting improvements to the premises. However, equitable assignment was defeated by the landlord's stated intention that it would only allow assignment of the lease with personal guarantees from the tenant's directors. Any representation to the landlord by the assignee as to its tenant status was countered by a representation by the actual tenant that it had never assigned the lease.

Turning to the facts, the Court found that payment of rent and occupancy were present, but insufficient on their own to make out equitable assignment. There was no evidence, as the successor alleged, of agreement to a month-to-month lease with the landlord. Further, the successor had sent a number of communications to the effect that it was making payments on behalf of the tenant as a gesture of goodwill, but that it did not consider itself bound by the lease. The successor argued that the landlord's application for pandemic-related rent support, but the Court held this was a neutral factor, and the extent that the successor benefitted was only the extent to which it was making payments "on behalf" of the tenant. Finally, the successor argued that it had made investments to improve the signs on the property, which it would not have without a good faith belief in a long-term commitment to the property. However, the lease required landlord approval for the signs, which was dubious, and in any event the cost of the sign replacement was not considered significant even in the face of uncertainty about whether the lease would continue long-term.

The fundamental test is about what the parties intended. The successor wanted to straddle a dual position, keeping itself at arms-length from the tenant to avoid liability while also seeking rights under the lease. It had attempted to negotiate a new lease without success. Instead the successor and landlord had reached an "under-arrangement", whereby it had interim occupancy while negotiating and rent payments crediting the tenant's rent in the "over-arrangement" (i.e. the lease). An intention to assign the lease, however, was not found.

Result
No equitable assignment was made out.

Anthem Crestpoint Tillicum Holdings Ltd. v Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI, 2022 BCCA 166

Facts:

This case is an appeal considering the defences available to a claim for unpaid rent owed pursuant to a commercial lease. The appellant, Anthem Crestpoint Tillicum Holdings Ltd. (the "**Landlord**"), was the landlord of the Tillicum Centre shopping mall in Victoria, British Columbia. The respondent, Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI (the "**Tenant**"), was a tenant in the mall under a lease that expired in 2024. The Tenant closed its store in the mall in June 2019 and stopped paying rent in April 2020. In July 2020, the Landlord filed a notice of civil claim for unpaid rent. In October 2020, the Landlord brought an application for summary judgement, or in the alternative a summary trial. The Landlord's application was dismissed on the basis that the Tenant raised genuine issues warranting a trial, and the Landlord has appealed that decision.

The Tenant argued two genuine issues existed that could provide a defence and require further discovery before trial. First, the Tenant claimed the Landlord's refusal to consent to an assignment of the lease in December 2019 was a breach of the lease, in addition to a breach of its duty of good faith contractual performance. Second, the Tenant claimed the Landlord's failure to pursue opportunities to re-let the premises was a breach of its duty of good faith contractual performance in addition to its duty to mitigate avoidable losses. The chambers judge concluded the Tenant should be permitted to explore those potential defences at discovery and ordered the Landlord to answer questions it objected to on grounds of relevance and dismissed the Landlord's application for summary judgement and alternatively summary trial. The Landlord appealed.

Issues:

Are either of the assertions made by the Tenant — that the Landlord unreasonably refused assignment of the lease to Value Village and breached a duty owed to the Tenant to make reasonable efforts to re-let the premises — capable of providing a defence to the claim for unpaid rent?

Held:

Are either of the assertions made by the Tenant — that the Landlord unreasonably refused assignment of the lease to Value Village and breached a duty owed to the Tenant to make reasonable efforts to re-let the premises — capable of providing a defence to the claim for unpaid rent?

The premises rented by the Tenant were for the purpose of operating a Home Outfitters store. However, in February 2019, the Tenant publicly announced it would close its Home Outfitters stores across Canada by the end of 2019 to focus on businesses with stronger growth opportunities. Accordingly, in July 2019 the Tenant closed its store located on the premises but continued to pay its monthly base rent of $58,760.50 as required by the lease. In November 2019, the Tenant notified the Landlord it had executed an assignment of lease with Value Village and requested the

Landlord's consent to the assignment. It was noted the assignment included several amendments to the lease, including the use clause restricting the use of the premises.

The Landlord declined its consent to the assignment, citing changes in the use clause allowing Value Village to sell secondhand goods from the premises that would put the Landlord in breach of its obligations to other tenants in the shopping mall. It was noted by the Court of Appeal that the Tenant did not surrender the lease, and that at the time this matter was heard by the Court of Appeal, it was still in possession of the premises. It was further noted by the Court of Appeal that the Tenant had not paid rent since April 2020.

Before the chambers judge, the facts supporting the Landlord's claim of unpaid rent were uncontested. The Landlord claimed the Tenant's failure to pay rent constituted repudiation of the lease, the Landlord further argued it was entitled to disregard the repudiation, insist on performance of the terms and sue for rent on the basis that the lease remains in force. The Landlord claimed none of the Tenant's allegations gave rise to valid defences for failure to pay rent, and that even if it had breached its duty of good faith contractual performance, such a breach would not constitute a defence to a rent claim and could only give rise to a claim for damages. Despite these claims, the chambers judge still found genuine triable issues were raised by the Tenant and dismissed the Landlord's application for summary judgement or summary trial in the alternative.

The nonpayment of rent by the Tenant was a repudiation of the lease that the Landlord was entitled to disregard if it wished to keep the lease alive or accept if it wished to terminate it. The Landlord did not accept the repudiation, but instead affirmed the lease, with the effect of this election being the Tenant's rent obligations continued. According to the Court, unless the allegations made by the Tenant resulted in a termination of the lease, the Tenant could not provide a defence to the claim for unpaid rent in a continuing lease agreement.

Under the principles of contract law, when a party to an executory contract repudiates the agreement, the non-repudiating party is entitled to make an election to either accept the repudiation and bring the contract to an end, or decline the repudiation, thereby keeping the contract alive in all respects for both parties. The non-repudiating party has the onus of establishing that it has accepted the repudiation and communicated that acceptance to the repudiating party within a reasonable time. Further, an election to accept or decline a repudiation is irrevocable.

Since the Supreme Court of Canada's decision in *Highway Properties Ltd. v. Kelly Douglas & Co.,* 1971 CanLII 123 (SCC), [1971] S.C.R. 562 [*Highway Properties*], following repudiation of a lease by a tenant, a landlord may elect to terminate the lease with notice that damages would be claimed for losses incurred during the unexpired term. The Court of Appeal noted such an option would be available under contractual principles, but not under traditional principles of property law. Citing *Highway Properties*, the Court of Appeal stated such an option should be available to a non-repudiating party to a lease on the basis that it was no longer sensible to pretend that a commercial lease is simply a conveyance and not also a contract, and further that it was equally untenable to persist in denying resort to the full armoury of remedies available to redress repudiation of covenants, merely because the covenants may be associated with an estate in land.

According to the Court of Appeal, the case *Lehndorff Canadian Pension Properties Ltd. v. Davis Management. Ltd.* (1989), 1989 CanLII 2762 (BC CA), 37 B.C.L.R. (2d) 306 (C.A.) [*Lehndorff*] confirms that the contractual principles of repudiation and acceptance apply to a tenant as well as a landlord. If a landlord commits a breach of a term of the lease that is so fundamental as to amount to a repudiation of the lease, the tenant has an election to make. It may elect to disregard the repudiation and keep the lease alive, or it may elect to accept the repudiation and terminate the lease, thereby relieving it of the obligation to pay rent. Unless the non-repudiating party accepts the repudiation and communicated that acceptance to the repudiating party within a reasonable time, the lease will be treated as subsisting and the parties will be required to perform their obligations under the lease.

The Court of Appeal noted the Landlord advised the Tenant on December 19, 2019 that it would not approve the assignment of the lease to Value Village. The Tenant then continued to pay rent until April 2020. When the Landlord commenced its action for unpaid rent, the Tenant tried to defend its actions by relying on a section of the lease that suspends the requirement to pay rent in certain circumstances. The Court of Appeal concluded those acts could only be characterized as affirmations of the lease. The Court of Appeal found the Tenant did not communicate an election to treat the Landlord's failure to consent to the assignment as repudiation and accept it, and further that the Tenant had not done so by the time of the hearing of this matter.

In this case, the Tenant sought further discovery from the Landlord towards alleging that the Landlord's true intention behind denying the assignment was preserving development flexibility instead of protecting its interests as a Landlord. The Tenant alleged that evidence produced on further questioning would allow it to base such a claim, and accordingly would allow it to claim against the Landlord as a repudiating party, due to the manner in which it withheld consent. However, according to the Court of Appeal this was not a tenable position. The Court of Appeal stated the non-repudiated party is not entitled to take a "wait-and-see" approach. It is required to reject or accept the repudiation within a reasonable period. If it accepts the repudiation, the termination is effective as of the communication of that acceptance, not as of the original breach. The Court of Appeal noted finding in favour of the Tenant would effectively allow it to accept repudiation three years after the event in question, with repudiation occurring retroactively. The Court of Appeal held three years is outside of any notion of reasonable time. In this case the evidence established that the Tenant did not accept, within a reasonable time, any of the Landlord's conduct it now alleges to be repudiatory. On this basis, the Court of Appeal held no further discovery was warranted. The lease was still in effect, and the Tenant was obligated to continue paying rent.

According to the Court of Appeal, what the Tenant claimed to be a duty to mitigate is not a duty at all. Rather, the Court of Appeal noted it is merely a shorthand for the principle that a plaintiff cannot recover damages that could have been avoided by talking reasonable steps available at the time. In this case, because the Landlord elected to disregard the Tenant's repudiation and keep the lease in effect, it was under no obligation to mitigate its loss. On this point, the Court of Appeal clarified there is no basis on which a landlord of a commercial premises can be required to mitigate its loss where it maintains the lease in existence and claims for rent due. This is a principle which the Court of Appeal noted has been accepted by courts across Canada. The Court of Appeal found there was no obligation on the Landlord to mitigate its loss because of the Tenant's nonpayment

of rent, and as long as the lease subsisted and the claim was for debt, not damages, the Landlord did not have a loss to mitigate.

While the Landlord may have been entitled to retake possession and relet the premises, the Landlord also had the right to insist on performance of the terms of the lease and sue for rent or damages on the footing the lease remains in force, which it chose to do. According to the Court of Appeal, the principles of good faith and contractual performance did not, at least not on the terms of the lease in question, alter the effect of this election. The duty to exercise contractual discretion in good faith is said to require the parties "to exercise their discretion in a manner consistent with the purposes for which it was granted in the contract".

The Court of Appeal found, contrary to the Tenant's argument the Landlord breached its duty of good faith contractual performance, the principles of good faith contractual performance have no application to the election made by the Landlord in this case to affirm the lease and the related decision not to take any steps to relet the premises. This decision by the Landlord did not engage the discretionary power conferred by a section in the lease. The Landlord was not exercising a contractual discretionary power, but rather a remedial right conferred by the general law of contracts as applied to leases.

Persica Consulting Inc. v Wescana Properties Inc., 2021 BCSC 2268

Facts

This is an action by the tenant seeking damages from the landlord for its refusal to consent to an assignment of the lease, and reimbursement of additional rent amounts allegedly paid in excess of rent owed.

The plaintiff tenant operated a pharmacy from the premises owned by the defendant landlord. The tenant entered into discussions to sell the pharmacy and sought the landlord's consent to assign the lease. The landlord had concerns regarding the buyer's financial status and refused consent. The original tenant told the landlord it was walking away from the deal with the buyer but asked that the landlord speak to the buyer directly to continue to discuss the lease. The tenant alleged that the landlord's refusal to consent was unreasonable and brought an action seeking damages. The landlord filed a counterclaim against the tenant seeking payment of the actual legal fees incurred to enforce and determine its rights under the lease.

Issues

1. Consent to Assignment
2. Did the Tenant request an "Assignment"?
3. Did the Landlord unreasonably withhold its consent to the proposed assignment?
4. Abandonment of the Premises
5. What damages, if any, are available to the Landlord?

Analysis

1. Consent to Assignment

Article 9.10 of the lease provided that the tenant was unable to assign or sublet the premises without prior consent in writing from the landlord and the consent was not to be unreasonably withheld.

2. Did the Tenant request an "Assignment"?

The tenant's email request on December 6, 2018 constituted a request for an assignment of the lease to the buyer because in this email, the tenant requested to extend the lease term for the benefit of the buyer.

2. Did the Landlord unreasonably withhold its consent to the proposed assignment?

The Court referenced various decisions, including Lehndorff Canadian Pension Properties Ltd. v. Davis Management Ltd.[1987] 13 B.C.L.R. (2d) 367(B.C.S.C.), aff'd [1989] 59 D.L.R. (4th) 1(B.C.C.A.), at chapter 6.26, *A Commercial Tenancy Handbook*, which summarizes the principles that will apply to determine whether a landlord's refusal to consent to an assignment is reasonable. They are as follows:

> 1. [T]he discretion must be exercised in good faith, and not for any collateral or ulterior purpose; if the landlord made its decision for a collateral purpose, unrelated or extraneous to the lease, the refusal will be found to be unreasonable; [and,]
>
> 2. [T]here is both a subjective and objective component to the landlord's decision. The landlord:
> a. can take a realistic look at its property and the type of tenants it has;
> b. must look at whether the proposed use is offensive or would hurt other tenants;
> c. must make a fair and reasonable assessment of the proposed tenant, in the context of the provisions of the lease for the use or uses permitted under the lease and the information provided to the landlord.
>
> The landlord must act honestly and in good faith but may rely on whatever facts and arguments it may choose, as long as the conclusions reached are ones that might have been reached by a reasonable person in the same circumstances.
>
> A landlord's failure to communicate the reasons for its refusal to consent to an assignment will also be an unreasonable withholding of consent: Jens Hans Investments Co. Ltd. v. Bridger, 2004 BCCA 340 at para. 42.

The tenant failed to discharge its burden of proving the landlord's refusal was unreasonable. In this case, the landlord made inquires and maintained frequent communications with the tenant and buyer regarding the proposed assignment and sale to the buyer. Its lawyer drafted the assignment and consent agreement. It amended that agreement when asked. It made inquiries and reviewed the financial information it obtained. Finally, it provided its response to the tenant's requests. The first time, having reviewed the financial information for the buyer's principals, it advised the tenant about its concerns about their creditworthiness. The landlord also provided additional reasons on December 6, 2018 when it advised that " . . . We have cancelled everything as I don't trust anyone anymore and was told deal is no more or off".

Although the first comment of concern by the landlord was made in respect of the request to amend, it served as a clear indication to the tenant that, by then, creditworthiness was an issue. The December 6, 2018 email from the Landlord confirmed that the uncertainty of the transaction was another issue.

For the above reasons, the tenant's claim that the landlord unreasonably withheld its consent to its request to assign the lease was dismissed.

3. Abandonment of the Premises

As of March 1, 2019, the tenant ceased its retail pharmacy operations from the premises but continued to pay rent and use the premises for storage. On March 26, 2019, counsel for the landlord delivered a notice of default to the tenant and buyer notifying them that it was in default of the obligations under the lease for abandonment of the premises. It followed up that notice with a termination notice delivered on April 10, 2019.

On April 12, 2019, the tenant filed the notice of civil claim commencing this action. On its applications heard on May 3 and June 3, 2019, the tenant obtained orders staying the notice of termination.

The lease did not define what constituted "abandoned" as contemplated by article 16.1, however the language of the article indicates that non-payment of rent or the abandonment of the premises is enough to avail the landlord of the remedies contemplated by that section. In other words, an abandonment can occur even in the absence of the failure to pay rent.

The ten days before the landlord can take an action for abandonment is also instructive. It suggests that a temporary absence from the premises is acceptable. Conversely, it also suggests that the parties did not anticipate that the tenant would be absent from the premises for more than 10 days.

In this case, not only have the tenant vacated the premises for longer than 10 days when the landlord served the notice of default, it had no intention of returning to the premises for its pharmacy business, nor did it. Its closure was not temporary, nor was it intended to be.

For this reason, the tenants conduct in ceasing to operate as a pharmacy in March 2019 constituted an abandonment of the premises.

4. What damages, if any, are available to the Landlord?

Article 18 provides of the lease provided that if it is necessary for the landlord to retain the services of a solicitor or any other proper person for the purpose of assisting the landlord in enforcing and/or determining any of its rights hereunder in the event of default on the part of the tenant, it shall be entitled to collect from the tenant the costs of all such services including all actual legal fees and disbursements as if the same were rent reserved and in arrears hereunder.

On that basis, the landlord was entitled to recover $25,141.73 against each of the tenant and its principal on a joint and several basis (as the principal had acted as guarantor under the lease). After deducting the $4,500 security deposit that the landlord currently retains, it was entitled to judgment against each of the tenant and buyer, on a joint and several basis in the amount of $20,641.73.

Tabriz Persian Cuisine Inc. v. Highrise Property Group Inc., 2022 ONCA 272

The tenant leased premises to operate its restaurant business. On three different occasions it tried to assign its lease, but the landlord refused to consent to the assignment. The lease contained a clause prohibiting the landlord from unreasonably withholding or delaying its consent to an assignment.

The tenant had previously built a patio on the common areas of the property without the landlord's approval (which was required under the lease) and the landlord had asked the tenant (on various occasions) to remove the patio, but the tenant had not done so. The issue surrounding the patio is the basis of a separate lawsuit brought by the tenant against the landlord.

On the third occasion of the tenant asking for the landlord's consent, the landlord stated that it would not consider the request for an assignment unless the tenant removed the patio and discontinued its lawsuit against the landlord.

The tenant brought an action for damages. The lower Court found that the tenant failed to show that the landlord acted unreasonably in withholding its consent to the assignments. It found that the landlord was not unreasonable in requiring the patio to be removed, as it was built without the landlord's approval as required pursuant to the terms of the lease. However, it found that withholding its consent until the tenant discontinued the parallel lawsuit was unreasonable, as it was the landlord's attempt to use its greater bargaining power to dismiss the parallel, and unrelated, lawsuit. Nevertheless, the Court found that this collateral purpose did not render the landlord's refusal unreasonable when viewed holistically, because a "reasonable basis to refuse consent saves a co-existing tainted purpose".

This decision was upheld on appeal. The Court of Appeal held that the landlord was not unreasonable in placing certain pre-conditions before considering the assignment, as there was enough detail in the correspondence between the parties suggesting that the landlord had clearly communicated to the tenant that the patio was not built in accordance with the terms of the lease and that the landlord wanted the patio removed.

The tenant argued that there was no term in the lease suggesting that the landlord could withhold consent because the tenant was in breach. The Court of Appeal held that reasonableness must be determined by considering the commercial realities of the marketplace and the economic impact on the landlord. The tenant's refusal to remove the patio imposed economic hardship on the landlord.

With respect to the primary purpose of the refusal (the removal of the patio) and the collateral purpose of the refusal (the discontinuation of the parallel lawsuit), the Court of Appeal analyzed the weights of the two factors and held that the primary purpose for refusing consent was reasonable, and the collateral purpose did not "infect" the primary purpose.

Curriculum Services Canada/Services Des Programmes D'Etudes Canada (Re), 2020 ONCA 267

The tenant entered into a lease with the landlord. The tenant made an assignment in bankruptcy. The trustee occupied the premises and paid occupation rent to the landlord. The landlord claimed 3 months' accelerated rent as a preferred claim. The landlord also claimed the balance of the payments owing under the lease and repayment of the tenant inducement that the landlord paid to the tenant as an unsecured claim.

Section 136(1) of the *Bankruptcy and Insolvency Act* sets out a scheme of payment priorities. It provides that a landlord has a priority claim (a preferred claim) for arrears of rent for a period of 3 months immediately preceding the bankruptcy, and, if provided for in the lease, 3 months' worth of accelerated rent, which must be offset by occupation rent paid by the trustee in bankruptcy.

The trustee limited the landlord's claim to the amounts that could be recovered under the preferred claim and refused to pay the amount requested by the landlord under the landlord's unsecured claim. The landlord appealed the decision to the Court.

The landlord argued that, upon a disclaimer, a landlord has priority to its claim for up to 3 months accelerated rent, while also having a claim with respect to the rent payable for the unexpired term of the lease in accordance with the lease. It claimed that the landlord's losses flowing from a disclaimer are contractual and should not be treated differently from any of the tenant's other creditors in a bankruptcy.

The Court dismissed the landlord's appeal and agreed with the trustee's original position. The landlord further appealed to the Court of Appeal.

The landlord argued that recent cases provided that a disclaimer of a lease does not bring an end to all obligations under a lease. Therefore, the obligation of the tenant to repay the tenant inducement in the event of bankruptcy as set out in the express provisions of the lease survived.

The Court of Appeal allowed the appeal in part. It agreed that the landlord's claim was limited to its preferred claim. The Court held that the disclaimer of the lease by the trustee operated to end the rights and remedies of the landlord against the bankrupt tenant's estate relating to the unexpired term of the lease, apart from the 3 months' accelerated rent provided under legislation and the lease.

The Court allowed the landlord to claim the unpaid balance of its preferred claim for 3 months' accelerated rent as an unsecured creditor. The landlord was found not to be entitled to the repayment of the tenant inducement nor the balance of payments owing under the lease.

McEwan Enterprises Inc. (Re), [2021] O.J. No. 6247 (Ontario Superior Court of Justice, November 1, 2021, G.B. Morawetz C.J.S.C.J.)

The tenant was a privately held corporation that owned and operated several restaurants. The tenant was facing financial difficulties and, in an effort to overcome these difficulties, sought an application to restructure its business under the CCAA. The tenant claimed that it made several efforts to overcome its financial complications but to no avail. To help keep the business afloat and satisfy its stakeholders, the tenant claimed that a restructuring procedure under the CCAA, requiring the courts approval, was necessary. The tenant brought an application asking the court to approve of its proposed transaction under the CCAA.

Under the CCAA, a debtor company can sell all its assets without producing a plan of arrangement if it receives approval from. To approve of a transaction under the CCAA, the Court must be satisfied that the tenant made a good faith effort to find a buyer that is not a related party, or, where a related party becomes the buyer, to ensure that the related party puts forward the best effort.

The tenant's proposed transaction was for the sale of substantially all their assets and the assumption of its liabilities through a purchase agreement to a related party. Under the transaction, all but one of the tenant's stores would remain in operation. The tenant argued that, in comparison to several alternative options that it had explored, this proposed transaction would result in the best outcome for their stakeholders, including their employees and creditors.

The tenant's proposed transaction was opposed by one of its landlords. Since the tenant made no attempts to find an unrelated buyer, the landlord argued that it did not make good faith effort to obtain a better offer. The landlord also noted that it had made an offer to the tenant to purchase the tenant's assets for the same price without the closure of any of the tenant's stores. The landlord claimed that the CCAA requirements were not met and the transaction should not be approved.

The Court, finding that the tenant did not satisfy the CCAA requirements, did not approve the proposed transaction. The Court determined that the tenant did not make good faith efforts to find an unrelated buyer and that the tenant failed to establish that the proposed transaction was superior to its other options.

Ultimately, the landlord and the tenant reached a settlement out of court where the landlord agreed to a mutual termination of the lease.

Clifton Associate Ltd. v Shelbra International Ltd., 2019 ABQB 536

Facts:

In or around 2004 or 2005, the defendant/appellant, Shelbra International Ltd. (the "**Landlord**"), became the registered owner of a two-storey office building (the "**Building**"). Upon taking possession of the Building, the Landlord did not measure the office spaces, but relied on the square footage stated in the tenant leases provided by the previous management company.

By a written lease agreement dated March 23, 2014 (the "**Lease**"), the plaintiff/respondent, Clifton Associates Ltd. (the "**Tenant**") agreed to lease an office noted as having 8,809 square feet for a term of 10 years. Pursuant to the terms of the Lease, the Tenant was to pay a base rent plus additional rent based on proportionate share of operating and management costs.

Pursuant to a written agreement on October 23, 2014 (the "**Amending Agreement**"), the Tenant's leased area was increased to 12,255 square feet to lease additional office space on the second floor of the Building (collectively, the "**Premises**"). The Lease and the Amending Agreement were both drafted by the Landlord and the square footage in these agreements was provided by the Landlord. In October 2015, the Landlord conducted a review of the Building and learned that building was 3,500 square feet larger than was noted in its leases. On October 12, 2016, the Landlord indicated to the Tenant that the total rentable area of the Premises had been remeasured to be 14,857 square feet. The Landlord did not alter the Tenant's base rent, but calculated the Tenant's additional rent based on 14,857 square feet. On November 1, 2016, the Tenant complied with this change but reserved right to challenge the increased rental area.

In 2016, the Tenant wished to aggressively downsize and, after numerous discussions with the Landlord and its eventual consent, the Tenant entered into a written sublease dated November 18, 2016 (the "**Sublease**") with Cannamm Limited Partnership (the "**Subtenant**") for a portion of the Premises.

The Sublease stated that, in the event of the Tenant being successful in challenging the Landlord's measurements, the Tenant would refund or credit the Subtenant the difference payable by the Subtenant under the Sublease. The Landlord stated that it was unaware of this arrangement until these proceedings commenced.

The Tenant was granted summary judgment by a Master and the Landlord appealed the Master's decision.

Issue
Was this matter suitable for Summary Judgment?

Held
Both parties agreed that the Standard of Review on an appeal from a Master was that of correctness.

Was this matter suitable for Summary Judgment?

Citing *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd*., 2019 ABCA 49, the Court concluded that this had not been an appropriate case for summary judgment.

The Master only relied on two paragraphs in the Lease which stated (at para 19):

> 14.01 AMENDMENT Any agreement hereafter made between Landlord and Tenant shall be ineffective to modify, release or otherwise affect this Lease, in whole or in part, unless the agreement is in writing and signed by the party to be bound thereby.
>
> 14.12 ENTIRE AGREEMENT This Lease, together with all exhibits and addenda, if any, attached hereto (which exhibits and addenda are incorporated herein for all purposes), contains the entire agreement between Landlord and Tenant with respect to the subject matter hereof. TENANT HEREBY ACKNOWLEDGES AND AGREES THAT NEITHER LANDLORD NOR LANDLORD'S AGENTS OR REPRESENTATIVES HAVE MADE ANY REPRESENTATIONS, WARRANTIES OR PROMISES WITH RESPECT TO THE BUILDING, THE PREMISES, LANDLORD'S SERVICES, OR ANY OTHER MATTER OR THING EXCEPT AS HEREIN EXPRESSLY SET FORTH, AND NO RIGHTS, EASEMENTS OR LICENSES ARE ACQUIRED BY TENANT BY IMPLICATION OR OTHERWISE EXCEPT AS EXPRESSLY SET FORTH IN THE PROVISIONS OF THIS LEASE.

The Tenant argued that no mechanism existed in the Lease as amended to increase the square footage and the Tenant's obligation to pay Additional Rent was not strictly based on a square footage calculation. The Tenant also submitted that the *Statute of Frauds* applied to both the Lease and the Sublease, although the Court noted that the Tenant never registered either the Lease or Sublease against the Landlord's title.

The Court found that the Landlord had drafted the Lease, Amending Agreement, and a Memorandum of Decision attached as Schedule 1 to the Sublease. As such, the *contra proferentem* rule applied to these documents.

The Court cited *IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing*, 2017 ABCA 157 (ABCA) at para 82 and *Creston Moly Corp. v. Sattva Capital Corp*., 2014 SCC 53, [2014] 2 S.C.R. 633 (SCC) to determine that it was entitled to consider relevant surrounding circumstances as exceptions to the Parole Evidence Rule.

The Court further considered *Ryan v. Moore*, 2005 SCC 38 and concluded that the doctrine of Estoppel was a live issue appropriate for trial, as it required a determination of the nature of any promises made by the Tenant to the Landlord.

The Court further concluded that the possible effect of the Sublease Agreement was a triable issue, particularly regarding the change in square footage which was included as Schedule 1 to the Sublease Agreement.

Conclusion:

The Court ruled that the Sublease Agreement, the exceptions to the Parol Evidence Rule, and the doctrine of Estoppel were all live issues meriting a trial in this matter. The Court found that the Master's apparent total reliance on the whole agreement clause contained in the Lease was insufficient to grant summary judgment. The appeal was granted and costs were awarded to the Landlord.

Mehak Holdings Ltd. v BBQ To-Night Ltd., 2019 ABQB 556

Facts

The defendant, Reena Fabric Saree Centre Ltd. (the "**Landlord**"), had previously operated a clothing store in a commercial condominium which it owned (the "**Premises**"). The Landlord then decided to lease the Premises to the defendants, Parveen Khan and her business, BBQ To-Night Ltd. (collectively, the "**Tenant**"), for use as a restaurant. The plaintiffs, Mehak Holdings Ltd. ("**Mehak**"), Sonali Jewellers Ltd. and Sungold Jewellery Ltd. operating as Sonali Jewellers (collectively, "**Sonali**") (Mehak and Sonali, collectively, the "**Plaintiffs**"), also owned businesses in other units in the same complex as the Premises.

On April 23, 2012, a fire started on the Premises which spread to the Plaintiffs' premises (the "**Fire**") causing damage. The Calgary Police Service investigated the fire and prepared a report (the "**Report**") in which it concluded that the fire was deliberately set by unknown individuals on the Premises. The Report also noted the following details (at para 6):

- The rear exterior lights of the premises had been turned off at the electrical panel;
- The rear door of the premises has been left propped open; and
- There were two cans of gasoline in the kitchen area of the premises that were unaffected by the fire. There was no conclusion as to how long these two gas cans had been stored or left in the kitchen area.

The Plaintiffs commenced an action in negligence against the Landlord, the Tenant, and other defendants, some of which were noted in default. The Landlord brought an application for summary dismissal.

Issues

Was there merit to the Plaintiffs' claim of negligence?

Held:

Was there merit to the Plaintiffs' claim of negligence?

Citing *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd*., 2019 ABCA 49, the Court determined that it had all the materials to make the necessary findings of fact to allow the Court to apply the law to the facts, and that summary judgement was a proportionate, expeditious and less expensive means to achieve a jut result.

The Court rejected the argument that the Landlord did not make regular inspections to ensure the Tenant was complying with its fire safety obligations under the Lease, as regular inspections would not have prevented an arsonist from entering the Premises and setting it on fire. Further, the Plaintiffs had not forwarded any evidence as to the standard practice for commercial landlords as to how often regular inspections should be done. As it had been more than seven years since the Fire, the Court ruled that the Plaintiffs had ample opportunity to gather such evidence if it existed.

Conclusion

The Court concluded that there was no merit to the Plaintiffs' claim and the Court summarily dismissed the action against the Landlord. The Court awarded costs of the application and the action to be paid to the Landlord.

First Aberdeen Properties Ltd. v Loblaws Inc., 2019 SKQB 101

Facts:

On March 23, 1981, predecessors to both current parties entered into a lease agreement (the "**Lease**"). The Lease contemplated the future construction and leasing of a shopping centre (the "**Premises**") to commence no later than five years from the date of execution of the lease. In addition to an initial term of 15 years, the Lease also gave the tenant an option to renew the Lease for four consecutive terms of five years. Particularly, the term stated that "no such Renewal Term shall commence unless immediately prior to the time for commencement thereof this Lease shall be in full force and effect and the tenant shall not be in default hereunder."

On June 1, 1998, the parties amended the Lease (the "**First Amendment**") allowing eight consecutive terms of five years and specified a minimum rent for each renewal term. The First Amendment also granted the tenant the right to construct an expansion of the Premises, which would be built at the tenant's expense but would become the landlord's property and would be leased to the tenant without any increase to the minimum rent. The First Amendment also gave the tenant the right to construct a gas bar at the mall site, upon construction of which would be subject to a rental amount of $4,000 per annum. The First Amendment allowed for renewals of the gas bar lease with the same condition that, immediately prior to the time for renewal, the tenant was not in default of the lease of the gas bar. The gas bar would remain the tenant's property to be removed by the tenant at the termination of the 1981 Lease.

On December 1, 2006, the parties amended the Lease again (the "**Second Amendment**") and Loblaws Inc. (the "**Tenant**") became the tenant of the Premises. Beginning in 2010, the Tenant undertook an initiative for all of its Extra Foods locations in Western Canada which included a detailed analysis of certain sites involving a roof assessment and a check for hazardous materials.

The parties entered into a fourth renewal term beginning December 1, 2011 and ending November 30, 2016 (the "**Fourth Renewal**"). During this time, the plaintiff, First Aberdeen Properties Ltd. (the "**Landlord**") acquired the Premises and entered into a third lease amending agreement (the "**Third Amendment**") with the Tenant acknowledging the Tenant's right to renew the lease for a fourth renewal term for a minimum annual total of rent of $99,618.72 and annual rent of $5,500.00 for the gas bar. As well, an additional renewal term was added to the total allowable renewals permitted on the Lease.

Six months before the fifth renewal term in May 2016 (the "**Fifth Renewal**"), the Tenant requested that the Landlord grant a split the upcoming fifth renewal term into two separate renewal terms, one term for one year, from December 1, 2016 to November 30, 2017, and a second term for four years, from December 1, 2017 to November 30, 2021. The Landlord agreed and signed a renewal split agreement on May 16, 2016 (the "**Renewal Split**").

On May 17, 2016, the Tenant engaged IRC Building Sciences Group ("**IRC**") to conduct a visit to the Premises (the "**Inspection**") to prepare a report on the roof condition (the "**Report**"), which was provided to the Tenant on May 31, 2016. The Report disclosed various roof replacements and repairs were required. The Tenant did not obtain express permission from the Landlord before

entering the roof. The Tenant did not give a copy of the Report to the Landlord, which did not know about the inspection or the Report until over one year later.

Unbeknownst to the Tenant's management, the Tenant's employees engaged Flynn Canada Ltd. to conduct roof repairs on February 18, 2017 and March 17, 2017 after the Tenant's employees reported roof leaks.

By May 30, 2017, the Tenant was obligated to provide notice if it wanted to exercise the four year renewal term effective December 1, 2017. The parties then negotiated a further one-month extension to provide notice by June 30, 2017 (the "**Extension**").

After the Extension was granted, the Tenant effected four more repairs on the roof. On October 26, 2017, the Tenant wrote a letter to the Landlord declaring that the state of the roof was unacceptable and serving the Report, with an additional report dated September 27, 2017, to the Landlord. The Landlord responded with a letter dated November 8, 2017 that the maintenance of the roof was the Tenant's responsibility, not the Landlord's.

Issues:

1. Did the Tenant breach its duty of good faith by failing to disclose any knowledge of previous roof leaks, thereby invalidating the Fourth Amendment?
2. Did the Tenant negligently misrepresent why it requested the Renewal Split thereby invalidating the Fourth Amendment?
3. Was the Tenant in default under the Lease for having accessed the roof or installing a sprinkler without the Landlord's knowledge or consent?
4. Was the Tenant in default under the Lease for failing to disclose the Report?
5. Did the Tenant reallocate the risk of the Lease by failing to disclose the Report before signing the Renewal Split?
6. Did the Tenant breach a duty of good faith in failing to promptly disclose the Report?
7. Did the Tenant breach the Lease when it made roof repairs without the Landlord's consent?
8. Did the Tenant negligently misrepresent the reasons why it sought the Extension?
9. Did the Tenant waive its right to a remedy if the Tenant breached the Lease in April, 2017?
10. Did the Tenant sublet the Premises in October 2017? If so, was the Tenant in default under the Lease to void a renewal?
11. Was the Tenant in default on November 30, 2017 by failing to inform the Landlord or obtain prior written consent before making roof repairs?

Held:

The Court cited *853571 B.C. Ltd. v. Spruceland Shopping Centre Inc*., 2009 BCSC 1187, [2010] 1 W.W.R. 324 for the general proposition that "where a lease provides preconditions to an option to renew, the onus lies with the optionee, the tenant, to prove the preconditions were satisfied" (at para 28). As such, the Court considered the entirety of the evidence to determine whether, on the

balance of probabilities, the Tenant had offered sufficient proof that it had met the requirements under the Lease to effect the Fifth Renewal.

The Court acknowledged that there had been several assignments of the Lease which complicated the task of discerning the intention of the parties who executed the Lease in the first place. The Court also observed that the Landlord had alleged nine instances that the Tenant breached the Lease, which all shared a common theme: that the Tenant allegedly accessed the roof while unauthorized to do so, that the Tenant withheld information respecting the roof, and allegations regarding the Tenant's repairs and installations to the roof.

1. *Did the Tenant breach its duty of good faith by failing to disclose any knowledge of previous roof leaks, thereby invalidating the Fourth Amendment?*

The Court considered *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494 (S.C.C.) ("***Bhasin***") in stating that the duty of good faith was a general principle, not an implied contractual term, imposing a duty of a minimum standard of honest contractual performance to "not lie or mislead the other party about one's contractual performance" (*Bhasin* at para 73).

The Court found that the circumstances surrounding the negotiation of the Renewal Split did not support a breach of good faith claim against the Tenant. The Court noted that the Inspection occurred after the execution of the Fifth Renewal, and that store management reported no active leaks on the date of the Inspection. Accordingly, the Tenant could not have been withholding information about previous leaks. The Court also found that the Landlord knew that the Tenant was undertaking an assessment to accommodate a new plan for the Premises.

Further, the Court noted that the evidence showed that the Landlord's predecessor had performed roof repairs. The Court inferred that roof repairs would have been done to either prevent or repair leaks. It was incumbent upon the Landlord to know of the status of the roof and not the duty of the Tenant to inform the Landlord of possible future roof leaks.

Additionally, the Court found that the Landlord's position was largely based on the Landlord's belief about the Tenant's motivation for requesting the Split Renewal, which it put forward in an affidavit. The Court found that the Landlord's belief was not anchored in evidence or further proof and was in breach of Rule 13.30(2) of *The Queen's Bench Rules*.

2. *Did the Tenant negligently misrepresent why it requested the Renewal Split thereby invalidating the Fourth Amendment?*

The Court relied upon Queen v. Cognos Inc., [1993] 1 S.C.R. 87 (S.C.C.) to set the five general requirements necessary to show negligent misrepresentation (at para 35):

- The Tenant must owe a duty of care to the Landlord, based on a "special relationship";
- The Tenant's representation must be untrue, inaccurate, or misleading;
- The Tenant must have acted negligently in making the misrepresentation;
- The Landlord must have relied, in a reasonable manner, on Loblaws' negligent misrepresentation; and

- The Landlord's reliance must have been detrimental to it in the sense that damages resulted.

The Court found that the circumstances surrounding the negotiation of the Renewal Split also did not support a claim of negligent misrepresentation. The Court restated its finding that the Tenant only became aware of the status of the roof after it had requested the Renewal Split. The Court accepted that the Tenant's reason for requesting the Renewal Split was because its analysis of its store would not be complete by the renewal deadline and splitting the renewal would allow it the opportunity to complete its analysis and decide whether to close the store at the end of the first year or exercise the option to renew for the remaining four year term.

Considering *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 (*"**Sattva***"), the Court did not find the circumstances warranted alteration of the plain meaning of the Renewal Split, and noted that, if the Landlord had suspected issues regarding the roof of the Premises, it could have inspected the roof itself and included an appropriate qualification in the Renewal Split. The Court also found that the Landlord had knowledge that the Tenant's reason for requesting the Renewal Split was because of its internal ongoing analysis.

Further, the Court rejected the Landlord's argument that it detrimentally relied upon the Tenant's alleged misrepresentation, as the Lease specifically required the Landlord, at its own expense, to repair the roof and maintained the right to enter, examine, and repair the Premises. The Court was not convinced of any reason why the Tenant would fail to disclose the state of the roof if it were the Landlord's obligation to repair it. Thus, the Court did not support the Landlord's assertion that the Tenant misrepresented its reasons for seeking the Renewal Split.

3. *Was the Tenant in default under the Lease for having accessed the roof or installing a sprinkler without the Landlord's knowledge or consent?*

After considering the provisions of the Lease and interpreting it according to *Sattva*, the Court determined that the definition of "leased premises" did not define a breach by itself but required interpretation with the clause which stated the instances when the Landlord could terminate and repossess the Premises. As such, the Court found that there was no provision in the Lease that stated that the Tenant could not view the roof. Further, the Court considered that the Landlord would not have avoided any negative result had the Tenant asked for permission to access the roof, and was inconsistent with its allegations against the Tenant.

Further, the evidence was not clear on whether the Tenant or another party had placed a sprinkler on the roof. The Court found that the Landlord's evidence was inconsistent with its allegations, and ruled that the Tenant had not breached its Lease because of the sprinkler's presence on the roof.

4. *Was the Tenant in default under the Lease for failing to disclose the Report?*

The Landlord alleged that the Lease contained an implied term that the Tenant had to disclose the Report. Citing *Hollander v. Tiger Courier Inc.*, 2014 SKCA 7 (Sask. C.A.) at para 28, the Court considered that the Landlord was the third owner to apply the Lease and found that no void existed in the Lease which required it to imply a term.

5. *Did the Tenant reallocate the risk of the Lease by failing to disclose the Report before signing the Renewal Split?*

The Court noted that the obligation to repair the roof always rested with the Landlord, regardless of who discovered that the roof needed repair or when the discovery was made. As such, the Court was not convinced that a failure to disclose the Report had reallocated any risk under the Lease.

6. *Did the Tenant breach a duty of good faith in failing to promptly disclose the Report?*

Following its decision that the Tenant had not breached a duty of good faith and that there was no implied obligation that the Tenant disclose the Report, the Court did not find that the Tenant breached a duty of good faith by failing to disclose the Report.

Further, the Court noted that the Landlord did not provide written notice to the Tenant that it was in breach of the Lease. Thus, pursuant to section 10(2) of *The Landlord and Tenant Act*, RSS 1978, C L-6, the Landlord had no ability to terminate the Lease.

7. *Did the Tenant breach the Lease when it made roof repairs without the Landlord's consent?*

The Court considered that, according to the Tenant's store manger (the "**Manager**"), the pre-November 2017 roof repairs were necessary as significant roof leaks were becoming an immediate health and safety concern for the Tenant's patrons and employees. The Court also accepted that the previous landlord had completed a number of roof repairs in response to ongoing roof leaks.

Pursuant to the Lease, the Court found that the Tenant was allowed to make "changes, alterations, installations, additions and improvements" to the roof with the Landlord's consent, which would not be unreasonably withheld. The Court did not find that emergency repairs to a leaking roof constituted a breach of the Lease on either February 18, 2017 or March 17, 2017, and noted that the structure of the roof remained the same. The Court held that the emergency repairs conducted by the Tenant's authority did not constitute an alteration, improvement, installation, or addition, which contemplated substantial changes to the Premises.

8. *Did the Tenant negligently misrepresent the reasons why it sought the Extension?*

The Court reiterated its position that the Tenant did not negligently misrepresent its intentions as this argument was unrealistic and inconsistent with the evidence presented to the Court. The Court considered that, by this time, the Tenant already knew that the roof needed repair from the Report, and the evidence did not support that the Tenant would gain any advantage by negligently representing the reason it was seeking the Extension.

9. *Did the Tenant waive its right to a remedy if the Tenant breached the Lease in April, 2017?*

As noted, the Court found that the Tenant had committed no breach of the Lease. However, the Court noted that, had a breach been found, the Landlord would have waived such breach. Despite

having received the Report and knowing that the Tenant had accessed the roof to perform emergency repairs, the Landlord did not deliver written notice of the breach to provide 15 days for the Tenant to remedy or pay compensation, as per the Lease. Further, the Landlord had executed a head landlord consent and estoppel certificate which confirmed the Lease was in good standing and in full force and effect.

10. Did the Tenant sublet the Premises in October 2017? If so, was the Tenant in default under the Lease to void a renewal?

The Landlord alleged that the Tenant sublet the Premises on October 20, 2017 based on an article published in the local newspaper titled "New Independent grocery store opens in mall" (at para 107). The Landlord alleged that, only six months later on April 11, 2018, the Tenant advised the Landlord through written correspondence that it had given up possession of the Premises and had changed the franchisee. The Tenant submitted that an assignment (the "**Assignment**") was only executed on April 22, 2018, 11 days after providing notice to the Landlord.

The Court considered the provisions of the Lease to conclude that, as long as the Tenant assigned its lease rights to a franchisee to whom it provided wholesale services, it did not need the Landlord's consent for an assignment and only needed to notify the Landlord within 30 days after the assignment occurred. The Court found that the Tenant had complied with this requirement by notifying the Landlord before the Assignment was executed. Further, evidenced through the correspondence between the parties, the Court noted that the Landlord had been aware the entire time of the Tenant's intention to re-brand the grocery store in the Premises.

Thus, the Assignment did not constitute a breach of the Lease on the Tenant's behalf.

11. *Was the Tenant in default on November 30, 2017 by failing to inform the Landlord or obtain prior written consent before making roof repairs?*

Consistent with its previous findings, the Court ruled that the Tenant did not breach the Lease for continuing to repair the roof between April and November 2017. Further, the Court noted that the Landlord could not expressly warn the Tenant that it had an obligation to mitigate its losses and continue to repair the roof, then later suggest that the Tenant was in default for effecting the repairs.

The Court noted that the Landlord had expressed significant concerns about its lack of income earning ability on the Premises considering it was bound by rates set in the Lease coupled with the cost of replacing the roof. The Court stated that the Landlord could not avoid this difficult situation by retroactively setting aside lease renewals that were previously unopposed at the time of renewal. As such, the Court found no need to address the Tenant's request for relief from forfeiture.

Conclusion:

The Court did not find that the Tenant had breached any of its obligations under the Lease by accessing the roof and effecting multiple repairs. The Court did not find that the evidence supported that the Tenant breached its general duty of good faith or engage in negligent misrepresentation. The Court awarded the Tenant costs in accordance with the tariff.

HPWC 9707 110 Street Limited Partnership v Funds Administrative Service Inc., 2019 ABQB 167

Facts

The defendant, Funds Administrative Service Inc. (the "**Tenant**"), entered into a lease (the "**Lease**") for 9707 110 St, Edmonton (the "**Premises**") with a former landlord on August 12, 1993. The Lease was then amended several times transferring the Premises to various landlords, until the Premises was transferred to the plaintiff, HPWC 9707 110 Street Limited Partnership (the "**Landlord**") on January 29, 2014.

The Lease stipulated that, if the Tenant defaulted on rental and other payments for 10 days, or it vacated the Premises for 30 consecutive days, the Landlord would be entitled to cancel the Lease and the Tenant would continue to be liable for payments for the duration of the Lease as if it had not been terminated, plus an interest at the rate of 2% above prime. The Landlord was required to, among other requirements, "maintain the building in accordance with accepted first-class building management standards," particularly regarding conditioning and ventilation, upgrades, utility systems, elevator service, and parking stalls (para 9). If the Landlord defaulted on any of its covenants, the Tenant was required to give written notice and a three day grace period to allow the Landlord to correct the default, failing which the Tenant's initial remedy would be to correct the default itself and demand payment from the Landlord, or to deduct the cost from the rent payable. Thereafter, if the Premises became untenantable or functionally unusable as a result of the default, the Tenant would be entitled to an abatement of rent until the default had been remedied.

On April 22, 2014, the Plaintiff complained about deficiencies in landscaping, elevators, HVAC, parking, electrical and garbage, and advised that it was considering withholding rent over its complaints. On May 7, 2014, the Landlord notified the Tenant that it was commencing renovations including the elevator, HVAC system, and parking. Starting May 21, 2014, the Tenant began to default several times on the Lease. Over the next year, the Tenant complained about further deficiencies and renovations, and eventually signed an alternate lease with Triovest Realty Advisors Inc. on April 14, 2015 at another premises.

On October 21, 2015, the Tenant provided the Landlord notice that it was vacating the Premises and accepted the Landlord's alleged repudiation of the Lease, effective October 26, 2015. On November 1, 2015, the Tenant ceased paying rent to the Landlord, and the Landlord began marketing the Premises.

The Landlord then brought action for damages and the Tenant brought a counterclaim for set-off. The Landlord subsequently brought an application for summary disposition against the Tenant for $491,653.11 and summary disposition of all claims against it in the Tenant's counterclaim.

Issues:

1. By vacating the premises and stopping payment of rent and other payment obligations, is the Tenant in breach of its covenants under the Lease?
2. Is the Landlord in fundamental breach of its covenants under the Lease?
3. Is the Tenant constructively evicted by the actions of the Landlord?

4. Is the Landlord in breach of its covenant of quiet enjoyment?
5. Is the Landlord entitled to damages from the Tenant, and is the Tenant entitled to a set-off as against those damages?

Held:

The Court applied the test for summary disposition in *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.,* 2019 ABCA 49 to determine that the evidence put before it was sufficient to address the matter on a summary disposition basis, and that it would be "a proportionate, more expeditious and less expensive means to achieve a just result" (at para 24).

1. *By vacating the premises and stopping payment of rent and other payment obligations, is the Tenant in breach of its covenants under the Lease?*

Citing *Highway Properties Ltd. v. Kelly, Douglas & Co.*, [1971] S.C.R. 562, the Court stated that, if a tenant has stopped paying rent and vacated the premises in breach of its lease covenants, a landlord is entitled to hold a tenant to a lease, terminate the lease and claim a right of action for damages, or sue for damages.

Considering the terms of the Lease, the Court found that the Tenant had breached its covenants to pay rent and other payments and to continuously occupy the Premises except for periods of less than 30 days.

2. *Was the Landlord in fundamental breach of its covenants under the Lease?*

The Court considered *Syncrude Canada Ltd. v. Hunter Engineering Co*., [1989] 1 S.C.R. 426 (SCC) at p 849 to determine that a fundamental breach occurs where the failure of one party to perform a primary obligation deprives the other party of "substantially the whole benefit" which the parties intended should be obtained from the contract (at para 34). Citing *Firth v. B.D. Management Ltd*., [1990] B.C.J. No. 2035 (B.C. C.A.) (QL), the Court noted that only breaches which go to the root of the contract were entitled to rescission of a lease agreement. Further, the Court considered *Kussmann v. AT & T Capital Canada Inc*., 2002 BCCA 281 (B.C. C.A.) at paras 16 & 27 to determine that a fundamental breach may occur as a result of multiple changes cumulatively resulting in a fundamental breach.

The Court considered that the Tenant had made a substantial amount of complaints starting February 1, 2014, and that the Landlord had made at least 32 notices to tenants from May 7, 2014 to May 21, 2015 with respect to inconveniences that were expected during the renovation period. Although it was clear to the Court that the Tenant experienced inconveniences that were aggravating and frustrating, they did not rise to the level of a fundamental breach. The Court noted that the Premises never became unusable or uninhabitable and the concerns did not deprive the Tenant of substantially the whole benefit of the Lease. Accordingly, the Court held that a fundamental breach did not occur which would allow the Tenant to rescind the Lease.

3. *Was the Tenant constructively evicted by the actions of the Landlord?*

The Court considered *Arangio v. Patterson*, [1993] O.J. No. 448 (Ont. Gen. Div.) (QL), *LaBuick Investments Inc. v. Carpet Gallery of Moose Jaw Ltd*., 2017 SKQB 341, *Krenzel v. Interprovincial Security Patrol (Red Deer) Ltd. (1982)*, 38 A.R. 153 (ABQB) ("*Krenzel*"), and *846-6718 Canada Inc. v. 1779042 Interior Ltd*, 2018 ONSC 1563 to determine that constructive eviction requires a landlord to intentionally deprive a tenant of the enjoyment of the leased premises to the point where the interference is so substantial that it would be reasonable for a tenant to vacate.

The Court found that the Tenant's concerns were not the intentional or probable consequence of the Landlord's intentional conduct, and were not permanent and wrongful to a degree to make the tenancy intolerable. Thus, the Landlord did not effectively evict the Tenant from the Premises.

4. *Was the Landlord in breach of its covenant of quiet enjoyment?*

After consiering *Franco v. Lechman (1962)*, 36 D.L.R. (2d) 357 (ABCA), the Court found that a reasonable tenant in the Tenant's position would not have thought the problems interfered with its ability to use the Premises for its intended purpose. The Court found that the majority of the Tenant's complaints arose out of frustration with the substantial renovation to the Premises. Further, the Tenant was given notice of the inconveniences that would be occurring due to the renovation and after each complaint, the Landlord had met with the Tenant quickly and addressed each complaint as efficiently as possible during the renovations.

Further, citing *Krenzel* and pursuant to the terms of the Lease, the Court noted that even if the Landlord had breached its covenant of quiet enjoyment, the appropriate remedy for the Tenant was not termination of the Lease but suspension of rent or damages.

Thus, the Court found that there was no breach of quiet enjoyment to the Premises that would have entitled the Tenant to vacate the Premises or cease paying rent or other payments under the Lease.

5. *Was the Landlord entitled to damages from the Tenant, and was the Tenant entitled to a set-off as against those damages?*

The Landlord alleged a total loss of rent of $492,653.11 which was uncontested by the Tenant. The Tenant claimed a set-off against the rent arrears for the inconvenience and complaints it put forward under the terms of the contract and at common law. Although the Court did not find that the Landlord committed a fundamental breach of contract, constructive eviction, or a breach of the covenant of quiet enjoyment, the Court held that the Tenant was entitled to set-off for the inconveniences and defaults it suffered. However, as the Court did not have any information as to the amount of the set-off, and considered it unequitable to set the amount at $0, it was unable to make a summary disposition on this issue and ordered that the set-off amounts be reached by an agreement between the parties, a return to the Court, or a determination by a referee.

Conclusion:

The Court was able to make a summary disposition on all issues except the set-off amount. The Tenant had breached its covenant to pay rent and other fees and to maintain continuous occupation of the Premises except for a period of less than 30 days. The Tenant's complaints regarding the

Landlord's conduct did not rise to the level of a fundamental breach, constructive eviction, or a breach of the covenant of quiet enjoyment to justify the Tenant's covenant breaches, but did allow the Tenant set-off against damages for its breaches of the Lease. The Court awarded costs to the Landlord on a party-and-party basis.

Innes v Koltylak, 2018 SKQB 325

Facts:

Until 1996, the Tenants owned 40 acres of land located just outside Regina city. They lived on the most northerly portion of the premises and operated a landscaping and Bobcat service business from a location on the most southerly portion.

In 1995, the Tenants wanted to sell the acreage while continue to operating the business on the premises. However, the parcel was zoned "AR – Agriculture Zone" and development restrictions of the Rural Municipality did not allow the subdivision of the parcel to create a separate title for the acreage. The Tenants decided to sell the entire parcel to take back a lease and an option to purchase, to be exercised when those lands could be successfully subdivided. The Tenants advertised the land for sale on this basis, describing the parcel as 13.2 acres of 40 acres, and 27 acres "to be on lease back to present owner until [the municipality] completes subdividing" (at para 5).

On December 31, 1995, the Tenants entered into a residential contract of purchase and sale for a portion of the Parcel with the landlords, which contained a term that the Tenants would pay for the legal costs of subdividing the remaining 27 acres. The purchase price of $185,000.00 did not include any payment for the 26.8 acres the parties intended to be subdivided and re-conveyed back to the Tenants.

The Tenants' lawyer prepared the initial draft of the lease and option to purchase agreement. Both the recital and the final executed version of the 1996 Agreement described the overarching agreement between the parties in the following terms:

> Whereas the Tenant sold all of the Lands to the Landlord on the express understanding that the Tenant would retain the beneficial ownership interest in and to the Business Lands… and on the understanding that the Landlord and Tenant will co-operate and do everything possible, as soon as possible, to subdivide the Business Lands from the current title and transfer the Business Lands to the Tenant for nominal consideration.

Upon the Landlords' concerns that the covenant to subdivide and transfer the Business Lands was of infinite duration, a recital was also added on the Landlords' request to state that the parties agreed that, if it was impossible to subdivide and transfer the Business Lands within the term of the 1996 Agreement the beneficial ownership interest would revert entirely to the Landlords. Other changes were made to the 1996 Agreement prior to execution making it clear that the right to exercise the option to purchase were conditional upon the subdivision approval being obtained. The Lease was for a term of 25 years to reflect the uncertainty over whether subdivision would be possible.

Rent of $50.00 per year was payable for the entire term of the Lease, which was described as a "net lease" to the Landlords as the Tenants were solely responsible for costs and expenses of maintaining the portion used for the business, except for property taxes which were paid by the Landlords.

Clauses 4, 9, and 10 of the 1996 Agreement were central issues in the dispute arising between the parties.

> Clause 4, with the heading "Permitted Use," constrained the Tenants' use of the Business Lands "only for the purposes of operating a gravel pit and storing sand, gravel, topsoil, backfill and the like" and "limited to the present scale of operation" of the Business in terms of traffic, hours, and kind of heavy equipment stored or used on the Business Lands.
>
> Clause 9, with the heading "Option to Purchase," granted the Tenant "the sole and exclusive option, irrevocable during the term of this Lease, to purchase the [Business] Lands" for $10.00 consideration.
>
> Clause 10, with the heading "Other Acts and Things," required the Landlords to "cooperate with the Tenant in obtaining all necessary approvals to subdivide" and to "immediately provide any and all information required" upon request of the Tenant.

Consideration for the 1996 Agreement was paid and the only outstanding step for the land to be re-conveyed to the Tenants was to secure the subdivision of the Parcel.

In the years immediately following sale of the land, a number of disputes arose between the parties, including a dispute over the rent owed and paid, an expansion of the business operations, and trees which were planted on the acreage which failed to thrive.

In early 2002, the Tenants asked the Landlords to approach the municipality to obtain subdivision of the Parcel. The Landlords did not submit a formal application but wrote the municipality and asked that the request be taken to council "for their thoughts." The subdivision request was refused as it did not meet the site size requirements.

By August 6. 2002, the Landlords' counsel sent a letter to the Tenants advising that they were in default for non-payment of rent and breaching the Lease and stated that the Option to Purchase was terminated as the land was incapable of subdivision. The Tenants' counsel replied denying any breach, asserting that the Landlords had until the end of the Lease term to secure a subdivision, and the expectation that the Landlords would cooperate in the next subdivision application. While the parties were negotiating for several years, additional disputes arose including allegations of trespass on the business by the Landlords and a limitation of the business operations by the municipality, causing additional legal proceedings.

Eventually, matters were settled by an Addendum to the 1996 Agreement in 2005. In the Addendum, the Landlords were to cooperate in allowing the Tenants to obtain development permits and licenses every year until the expiry of the Lease in 2021, and the Tenants would pay $1,700.81 representing full and final payment for half of the property taxes arrears from 1997 to 2004, inclusive. In the Addendum, all provisions in the Lease were adopted, restated, and incorporated and remained in full force and effect.

The Landlords argued that this Addendum, while forgiving a breach of Clause 4 up to the date of execution, did not permit further breach of Clause 4.

In the spring of 2008, the Tenants took steps to subdivide the land by preparing and submitting an application for subdivision to the municipality, which proposed the land to be rezoned residential and the Tenant's portion to be used as a pasture and sandpit. The Tenants completed the application for subdivision in the name of the Landlords but signed the application for subdivision in the Tenants' name. This process also required the Landlords to sign other documents which they delayed in doing. In the end, the Landlords signed the subdivision application in 2009 and no additional consideration or nuisance release was provided. A letter dated May 5, 2010 from the municipality rejected the application advising it was not possible to subdivide the Parcel as it did not meet the zoning bylaws, but that it could be possible in the future.

On August 27, 2010, the Tenants proposed a preliminary draft of a development plan to the Landlords after the municipality passed a revised community plan and zoning bylaw. The Tenants did not hear from the Landlords.

On August 25, 2011, the municipality's official community plan and zoning bylaw was approved. The significance was that the subdivision of the parcel could be accommodated. However, further development on the Parcel would require rezoning.

On January 24, 2012, the Tenants submitted a subsequent application for subdivision without the knowledge of the Landlords. In this application the Tenants swore that they were authorized in writing to act as the registered owner, as they understood they had been authorized to act as the registered owner due to the 1996 Agreement.

Once the Landlords became aware of the subsequent application for subdivision, they informed the municipality that they did not consent and the file was closed. The Ministry made it clear that the file would be reopened if the subdivision was endorsed by the Landlords.

The Tenants then submitted an identical application for subdivision to the Landlords for signature. The Landlords refused to sign it on the basis that they did not believe it matched the Tenant's actual intentions for development. At this point, the Tenants commenced an action.

Issues:

1. Did the option to purchase expire when subdivision approval was rejected in 2010?
2. Did the Tenants breach the 1996 Agreement?
3. If so, can the Landlords treat the option to purchase as terminated?
4. If the 1996 Agreement remained in effect, did the Landlords breach paragraph 10 of the 1996 Agreement by refusing to execute the Second 2012 Subdivision Application?
5. If the Landlords breached the 1996 Agreement, what remedies were appropriate?
6. Did the tenant's business cause a nuisance?
7. If the Tenants breached the 1996 Agreement and/or caused nuisance, what were the Landlords' damages?

Held:

1. *Did the option to purchase expire when subdivision approval was rejected in 2010?*

The Court addressed this issue by considering whether the 1996 Agreement contemplated the possibility of multiple attempts at subdivision approval.

The Court concluded that the recitals from the 1996 Agreement indicated that the Option to Purchase only existed as long as the Lease had not been terminated, regardless of whether a subdivision approval had been granted. The Court rejected an argument that the phrase "failure to obtain subdivision approval" meant that the Option to Purchase ended with a single failure in a subdivision application, as this interpretation would unnecessarily restrict the verb "obtain". Instead, this phrase was intended to refer to a failure to obtain a subdivision approval by the expiration of the Option to Purchase. The Court further rejected an argument of *contra proferendum* as both sides were represented by legal counsel throughout.

The Court considered that, but-for the restriction in subdivision, title to the leased premises would be in the Tenants' name, and the 1996 Agreement contemplated that the Tenants would remain beneficial owners of the premises. The Landlords did not pay for the premises, and the Tenant could exercise the Option to Purchase for a nominal fee of $10.00. Finally, that the Landlords insisted on having a termination clause to address the possibility that conditions for subdivision were uncertain suggested that attempts at subdivision may be ongoing, and not constrained to a single attempt.

The Court decided that an alternate interpretation would frustrate the intent of the parties and must be interpreted as allowing the Tenants to exercise their Option to Purchase at any point prior to the end of the Lease, on the condition that subdivision was granted. Further, the Court determined that the Landlords' refusal to sign the subdivision application was a breach of the 1996 Agreement, unless the Lease had terminated for other reasons.

2. *Did the Tenants breach the 1996 Agreement?*

The Landlords complained of increased noise and dust associated with an expansion of a gravel extraction pit on the leased premises. The Court found that the levels of dust and noise the Landlords experienced gradually worsened after 1996, reaching its worst in 2012 and improving after 2013. The Court also noted that other surrounding changes also created a more modest interference of the use and enjoyment of the lands.

The Court ruled that an increase in the size of the pit was a natural consequence of the continued operation of the tenant's business, which had been contemplated and agreed upon in the 1996 Agreement, and found that a significant increase in the level of noise and dust was an inevitable consequence of the business's continued operations. However, the Court found that the hours of operation had slightly but materially changed in 2012 and 2013 as the Tenants started working later into the evening and the type and kind of operation had changed as the equipment was upgraded to a larger scale and an excavator was added when the business operations were at their

most intense in 2012 and 2013. In the end, the Court found that the increase in hours of operation and traffic, along with a change in the type and kind of equipment, constituted a breach of quiet enjoyment.

3. *If so, can the Landlords treat the option to purchase as terminated?*

Considering sections 9 and 10 of *The Land Titles Act*, 2000, SS 2000, c L-5.1 and *McDougall v. 101048690 Saskatchewan Ltd.*, 2004 SKCA 11, the Court ruled that notice of termination is required by a landlord to allow a tenant to cure the breach and avoid forfeiture. The Landlords provided no proper notice of their intention to seek termination of the Lease, although it had been threatened, and thus were barred from claiming an order to cancel the Lease.

4. *If the 1996 Agreement remained in effect, did the Landlords breach paragraph 10 of the 1996 Agreement by refusing to execute the Second 2012 Subdivision Application?*

The Court considered that a letter from the RM made it clear that the subdivision of the parcel could be accommodated by rezoning only the acreage, and the Landlords were not entitled to refuse to fulfil their obligations under Clause 10 based on the potential that the Tenants may seek different zoning in the future. It was not proper for the Landlord to withhold cooperation in respect to a subdivision application that did not involve a change in the current zoning of the Business Lands.

As such, the Court concluded that the 1996 Agreement had not been validly terminated and the Landlords breached their obligations under the 1996 Agreement by refusing to execute the subdivision application documents.

5. *If the Landlord breached the 1996 Agreement, what remedies were appropriate?*

The Tenants requested specific performance directing the Landlord to sign the application for subdivision. Considering *Raymond v. Raymond Estate*, 2011 SKCA 58, the Court determined that an award of specific performance required determining: (1) that the subject property was specifically suited to the applicant, (2) that no comparable substitute property was readily available, and (3) that damages would be inadequate.

The Court noted that the Tenants had already been operating on the leased premises before the execution of the 1996 Agreement and for the 22 years following that. Further, there was evidence that the Tenants had to temporarily move their business operations but then had moved them back to the premises, and that the location was in a uniquely close proximity to the city of Regina, the Tenants' residence, and Highway 46. Thus, the Court concluded that the test for specific performance had been met.

Regarding the order for specific performance, the Court noted that it could not direct the appropriate authorities to proceed with the subdivision. Further, directing the Landlords to sign a specific application may be ineffective if the form or requirements had changed. Thus, the Court directed the Landlord to cooperate in a subdivision application consistent with the one last proposed by the Tenants.

The Tenants also sought damages for preparing the subdivision application, compensation for flooding in 2011, and punitive damages. The Court awarded damages for preparing the subdivision application as they directly flowed from the Landlords' breach of the 1996 Agreement. However, the Court rejected damages for flooding as there was no evidence that the flood was attributable to the Landlords' actions and it was not directly raised in the pleadings of the action. Finally, the Court also rejected an award of punitive damages as the Landlords' position was not devoid of merit and the Tenants had also breached the 1996 Agreement themselves.

6. Did the tenant's business cause a nuisance?

The Court first addressed the principle that nuisance cannot be found where the act was consented to beyond mere acquiescence, citing *McCallum v. Kent (District)*, [1943] 3 W.W.R. 489 (B.C. C.A.) (WL) [McCallum]; *Pattison v. Prince Edward Region Conservation Authority (1984)*, 53 O.R. (2d) 23 (Ont. H.C.) [Pattison], aff'd (1988), 27 O.A.C. 174 (Ont. C.A.); *Ostry v. Warehouse on Beatty Cabaret Ltd. (1992)*, 21 R.P.R. (2d) 1 (B.C. S.C.) (WL); *Miller v. Weyburn (Rural Municipality) No. 67*, 2000 SKQB 527, 200 Sask. R. 1 (Sask. Q.B.); and *Bartlett v. Corner Brook (City)*, 2003 NLCA 10. The Court determined that consent to the general business operations went beyond acquiescence because they were contractually agreed upon. As many of the complaints forwarded by the Landlord directly stemmed from the business operations, these could not be considered nuisance.

The Court then considered the test for nuisance as stated in *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, 2013 SCC 13, which had two parts: whether the interference with the owner's use or enjoyment of the land was (1) substantial, and (2) unreasonable. The Court concluded that the interference with the Landlords' land was substantial, as it affected their daily living and willingness to be outside due to significant dust and noise. It also concluded that the interference was unreasonable to the extent that the Tenants' actions went beyond the terms of the 1996 Agreement. The Court concluded that this occurred in 2012 and 2013 when the Business operations were at their peak, and therefore constituted a nuisance in those years.

7. If the Tenants breached the 1996 Agreement and/or caused nuisance, what were the Landlords' damages?

The Court compared the actual interference the Landlords had experienced with the hypothetical state the Landlords would have experienced if the Business operations were in accordance with the 1996 Agreement. It concluded that an actionable nuisance only existed in 2012 and 2013 when a breach of the 1996 Agreement occurred.

The Court considered *Nippa v. C.H. Lewis (Lucan) Ltd. (1991)*, 82 D.L.R. (4th) 417 (Ont. Gen. Div.) and *Kenny v. Schuster Real Estate Co.* [1990 CarswellBC 1754 (B.C. S.C.)], 1990 Can LII 1092 [Kenny] aff'd (1992), 10 B.C.A.C. 126 (B.C. C.A.) to set damages at $15,000.00 for the two years, considering the damages were difficult to set as the case law did not address a situation where a base line of interference was non-actionable. Further, an injunction remedy was inappropriate, as the evidence did not support a continuing nuisance.

Conclusion:

The Landlords had breached the Lease by failing to sign the subdivision application. The Tenants had also breached the Lease by increasing its business operations, and constituted a nuisance in 2012 and 2013 when operations were at their peak intensity. The Landlord had not provided notice of termination so could not seek an order terminating the Lease.

The Court ordered that the Landlords owed $2,656.50 plus interest in damages and ordered specific performance to comply with the 1996 Agreement and cooperate with the Tenants' subdivision applications. The Court ordered that the Tenants owed $15,000.00 for breach of contract and nuisance. Both parties owed interest subject to *The Pre-judgement Interest Act*, SS 1984-85-86, c P-22.2. Since the success in the action was divided, the Court did not award costs.

Kingdom Properties Ltd v Kilometer 147 GP Ltd (Limited Partner Kilometer 147 LP), 2021 ABQB 881

Facts

This is a summary judgment and summary dismissal decision of Master Summers.

The plaintiff tenants leased lands from the Crown under the *Public Lands Act*, divided into 2 separate leases. Under that legislative framework, any sublease must be approved by the Crown, but Crown approval was never received. Nevertheless, the defendant subtenants formed a limited partnership and subleased both leases. Under both subleases, the subtenants indemnified the tenants for any loss arising out of the subtenants' failure to pay rent. The subtenants operated an oilfield camp, and by 2015 were behind on rent. In they re-entered the property to continue operations without clearing the arrears, and by 2017 they were evicted. The tenant claimed against the subtenant for rent arrears, accelerated rent, overholding, damages for the unexpired term of the subleases, and contracted services (setting up camps), and unjust enrichment. The subtenant defended on the grounds that the subleases were illegal, that Crown approval was a condition precedent to the leases, that no agreement ever existed, and on public policy grounds.

Issues

1. Was the contract illegal and therefore void?
2. Was Crown approval a condition precedent?
3. Was the claim for rent of the unexpired term made out?

Held

1. Was the contract illegal and therefore void?

The subtenant argued the contracts were statutorily void absent Crown approval, citing section 151 of the *Public Lands Administration Regulation*, Alta Reg. 187/2011. The tenant argued the subtenant was estopped from relying on that illegality by a term in the sublease under which the subtenant covenanted not to plead on a lack of Crown approval as a defence to the validity of the sublease, to which the subtenant argued this term could not override the statute.

It is noteworthy that the Crown had sanctioned the tenant for violating the terms of the lease (by subleasing).

The Master reviewed the doctrine of illegality, noting that the doctrine was applied more flexibly in modern times, citing *Love's Realty & Financial Services Ltd v Coronet Trust*, 1989 ABCA 63. The Master wrote:

> [34] His Lordship's conclusion (at paragraph 39) was: "...one can refuse to apply the traditional rule in a case when to apply it would have harsh effect and is not required to affirm the legislative policy".

> [35] In this case before me, adoption of the traditional rule (the rule that a Court will not enforce an illegal contract) would indeed have a harsh effect. Kilometer 147 and the Indemnifiers would have no liability to Kingdom Properties, despite Kilometer's occupation and use of the Sublease lands for a considerable period of time. Nor do I think that adoption of the traditional rule is necessary to affirm the legislative policy (of the *Public Lands Act* and its regulations). The Crown has taken its own steps to sanction Kingdom Properties for its breach of the statute.
>
> [36] On this point I conclude that I am not bound to refuse to enforce the Subleases and Indemnities because the Subleases were illegal.

2. Was Crown approval a condition precedent?

The preamble of the sublease stated the parties were working on building a camp which would be moved onto the property once Crown approval of the sublease was obtained. The sublease was also explicitly subordinate to the tenant's lease from the Crown, and since the tenant had covenanted not to sublease without approval, the subtenant argued Crown approval was therefore a condition precedent of the subleases. But the Master disagreed. It was not a "true condition precedent". The movement of the camp would occur when the parties agreed, which would have to be after the Crown approved the sublease, but Crown approval in itself was never made a condition of the sublease's validity. The fact that Crown approval was misrepresented by the tenant to the subtenant did not elevate a mutual expectation to a condition precedent.

3. Was the claim for rent of the unexpired term made out?

Based on the above findings, the Master granted summary judgment on the rent in arrears. However, he also granted summary dismissal of the claim for rent for the remainder of the unexpired term. The tenant could not prove that it now had a valid lease under which to sublease, and consequently could not prove its ability to "provide quiet enjoyment under a lawful subtenancy" for the remainder of the term.

For the same reasons, the Master would have allowed the tenant's alternative claim for unjust enrichment on a *quantum meruit* basis for the rent in arrears, as the subtenant had enjoyed use of the land and the tenant had been correspondingly deprived, but not for the rent for the unexpired term.

Conclusion

The tenant's claim for rent in arrears was granted on a summary basis, but its claim for rent for the unexpired future term of the lease was summarily dismissed. Other, more fact-specific claims relating to whether certain of the parties were liable to certain others, were genuine issues requiring trial.

Urban Square Holdings Ltd. v Governali, 2020 ABQB 240

Facts

This is a summary dismissal decision, written by Master Robertson.

Governali leased space in a shopping centre owned by Urban Square. Governali operated a computer repair shop out of the space. While using a welder to install security bars on the property, Governali started a fire that caused significant damage to the property. Urban Square and its insurer brought an action to recover costs of the fire damage (Urban Square had only insured 90% of the replacement value against fire, so it remained in the action in its own capacity along with its insurer to claim against the deficiency).

The lease contained the following insurance provisions:

- Occupancy costs, including the costs of insurance the landlord had to take out under the lease, were passed on to the tenant on a proportionate-share basis
- The landlord covenanted to maintain replacement value insurance against "fire and other risks"
- The tenant covenanted to maintain "public liability and property insurance and Lessee Legal Liability Insurance Insuring the Lessor and the Lessee against all sums which the Lessor of the Lessee may become obliged to pay as damages by reason of injury to persons on the premises of the Shopping Centre" in the amount of $2,000,000
- The tenant covenanted not to do anything to cause the landlord's insurance premiums to increase, and to pay the cost of any increase attributable to the tenant
- The tenant indemnified the landlord for any injuries or damage and for non-performance of the insurance obligations

Issues

1. Did the tenant covenant to insure against fire damage?
2. Was the landlord/insurer action barred?

Held

1. Did the tenant covenant to insure against fire damage?

The Master notes at para 28 that cases like these turn on the language of the lease.

The landlord argued that the covenant to insure against "property damage" included fire damage, but the Master disagreed. At para 34 he wrote:

> [34] In my view section 12.02 did not require the tenant to have fire insurance. That was expressly required of the landlord in section 12.01 ("The Lessor covenants and agrees to place and maintain (a) Insurance against fire and other risks as are included in a standard fire and extended coverage insurance contract") and it is incomprehensible that after such a clear reference to fire insurance that an obligation of the tenant to obtain to obtain fire insurance would be embedded in such an oblique reference as one simply to obtain insurance for "property damage".

As a matter of contractual interpretation, the Master held that each party had covenanted to provide different types of insurance: the landlord would provide fire insurance and the tenant for other types of liability and damage insurance, with the tenant paying its proportional cost of the fire insurance. In short, expressly requiring the landlord to have "fire insurance" and impliedly requiring the tenant to have the same insurance under the umbrella of "property damage" made no sense. If the parties intended both parties to have insurance for the same thing, it would use the same language for both.

However, as noted below, the Master found that this did not matter, since fire insurers and landlords are generally barred from seeking compensation from tenants where the tenants pay the cost of the insurance premium.

2. Was the landlord/insurer action barred?

Citing *Howalta Electrical Services Inc v CDI Career Development Institutes Ltd*, 2011 ABCA 234, the Master noted there are two bars to actions against tenants in fire insurance disputes. Bar A is where the insured has paid the fire insurance premiums. Bar B is where the landlord covenants to obtain fire insurance and impliedly covenanted to give the insured the benefit of that insurance. Both applied to this case.

The Master quoted from *Madison Developments Ltd v Plan Electric Co*, [1997] OJ No. 4249 (CA):

> The law is now clear that in a landlord-tenant relationship, where the landlord covenants to obtain insurance against the damage to the premises by fire, the landlord cannot sue the tenant for a loss by fire caused by the tenant's negligence. A contractual undertaking by the one party to secure property insurance operates in effect as an assumption by that party of the risk of loss or damage caused by the peril to be insured against. *This is so notwithstanding a covenant by the tenant to repair which, without the landlord's covenant to insure, would obligate the tenant to indemnify for such a loss*. This is a matter of contractual law, not insurance law, but, of course, the insurer can be in no better position than the landlord on a subrogated claim. The rationale for this conclusion is that the covenant to insure is a contractual benefit accorded to the tenant, which, on its face, covers fires with or without negligence by any person. There would be no benefit to the tenant from the covenant if it did not apply to a fire caused by the tenant's negligence
>
> [Emphasis added by the Master]

The Master wrote at paras 50-51:

> [50] In my view, the approach adopted by Bensler, J. in ***Core Ventures Inc v Trio Chute Inc (Aluminum Planet)***, 2017 ABQB 784 at paragraph 49 is the correct one:
>
> > In light of the case law it is clear 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.
>
> [51] This lease does not contain "clear language" that leads to a different result than that expressed in ***Sun Life*** or ***Madison Developments***. A landlord and tenant could expressly agree that, "the landlord will buy fire insurance, and the tenant will share its part of the premiums on a pro rata basis as occupancy costs but nonetheless the benefit of the insurance will be of no value to the tenant." But that would have to be set out very clearly in the lease for it to be effective, because it makes no commercial sense.

This last sentence reveals the essence of the Master's thinking. If a tenant has to reimburse an insurer for fire damage for which the tenant paid the cost of the policy, what is the landlord covenanting to do? The only reasonable explanation, say the courts, is that this is to be read as a contractually bargained-for allocation of risk to the property. In the words of the Ontario Court of Appeal in *Madison* (above), a covenant to insure operates as an assumption of risk against the insured peril.

The Master, following Benzler J in *Core Ventures* (above), leaves open the possibility that a given lease could theoretically lead to a different result, suggesting that parties could contract out of this immunity of tenants. However, this is with the proviso that the result must still be "commercially reasonable", else the courts will fall back on the assumptions of common law.

Conclusion

The Master summarily dismissed Urban Square and its insurer's claims. Not only had the tenant not covenanted to insure against fire, the landlord and its insurer were barred from seeking compensation from a tenant who had contributed to the cost of the fire insurance policy.

Allen v Khinda, 2022 BCSC 815

Facts

This Application concerns a show cause hearing and a claim for possession of the lands brought pursuant to section 25 of the *Commercial Tenancy Act*, RSBC 1996, c 57 ["the CTA"] concerning a lease agreement between the plaintiff tenant, Felicia Allen (the "**Tenant**"), and the defendant, Mejor Singh Khinda (the "**Landlord**").

The Tenant rented an area of the Landlord's farm, located at 4645 – 192nd St. Surrey, British Columbia to use for her business of farming and stables operations, commencing July 1, 2021. The Landlord contends the Tenant failed to pay rent during the month of November 2021 thereby breaching the lease and entitling them to apply for possession of the premises under the CTA. On January 21, 2022, the Landlord filed a claim for possession and rent owing. It was noted by the Court that despite the Landlord initially applying for relief under section 19 of the CTA, the Landlord later realized those sections were inappropriate, and that they in fact intended to proceed under section 25 and section 26 of the CTA, for failing to pay rent within 7 days of an agreed-on time.

Issues

1. *When was payment of rent due?*

2. *Did the Landlord have a valid claim for rent in November 2021?*

3. *Does the Court have jurisdiction to reconsider the matter pursuant to section 18 or section 25 of the CTA?*

Held

1. *When was payment of rent due?*

The lease in this case included the following terms:

> "First-year rent is $2200, second-year $2400, third-year $2600 – per month.
> This agreement begins July 1, 2021 with a $500 – cash deposit paid upon signing.
> Mr. Khinda has received $500 towards July rent by signing."

The Landlord contended the lease created a month-to-month tenancy with rent payable on the first day of each month, due to an oral agreement made after the lease was entered. The Tenant made rental payments on the first of each month, but contended the lease was a 3-year lease and that they did not agree to payments on the first day of each month. The Court found, in this case, that the parties had agreed to a 3-year term lease based on the description of the rental payments set out in the lease terms, regarding rent for each year.

According to the Court, the terms of the lease clearly indicate the parties' intention that rents would increase for each of the second and third year, and that the Tenant would pay rent on the first of each month except for November. The Landlord provided no evidence in support of rent being due on the first day of the month, except their own assertions.

On September 18, 2021, the Landlord purported to terminate the lease with one month's notice, effective October 31, 2021. At this time, the Landlord alleged several defaults under the lease, including interference with other occupants of the land, engaging in illegal activity, failure to perform repairs, failure to remedy breaches of the lease, and assigning or subletting the Tenant's interest without the Landlord's consent. The Tenant paid rent for October 2021, and the Landlord accepted this payment in spite of the termination of the lease and the demand that the Tenant vacate the lands by October 31, 2021.

On November 27, 2021, the Landlord gave a second notice terminating the lease, effective November 27, 2021, for nonpayment of rent. This notice provided 5 days' notice for the Tenant to vacate the lands. A Residential Tenancy Branch arbitrator (RTB Arbitrator) heard the dispute, but decided the lease was commercial and it lacked jurisdiction. The Landlord argued before the RTB Arbitrator that the Tenant's lease had been terminated in September 2021 and that the Tenant's right to possession ended October 1.

According to the Court, in this case, the lease was terminated in September 2021, which was followed by a reference question to the RTB Arbitrator. The decision that such an application was outside its jurisdiction was made in mid-November 2021. Nonetheless, the Landlord purported again to terminate the lease on November 27, 2021. Thus, at the time the proceeding that is the subject of this decision was commenced, regardless of whether the lease was terminated in September 2021 or November 2021, section 25 could not be invoked.

The Court noted, if this proceeding was brought under section 18 and section 19, the Landlord's approach would still have been deficient because the Landlord's termination of the lease and demand for possession of the lands, without a notice to quit, would not support granting an order for a show cause hearing, and at the hearing the relief claim would be dismissed.

The Landlord argued that payment on the 1st of the month was implied For a term of a contract to be implied, the following conditions must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

With respect to the timing of rent payments, according to the Court, it is a well-established principle that rent payable in advance (for example, at the beginning of the year or month) must be clearly specified in the lease, and in the absence of an agreement rent would be payable at the end of the time specified in the lease. The Court noted in certain cases,

historical dealings between the parties can determine whether another agreement had been made.

In this case, the Court found the Tenant's rent due under the lease was not payable until November 30, 2021. This finding was based upon: the timing and circumstances surrounding the hearing before the RTB Arbitrator during November 2021; the Landlord's termination of the lease in September 2021; and the absence of any express term in the lease requiring payment of rent on the first day of each month.

2. *Did the Landlord have a valid claim for rent in November 2021?*

The Court found the Landlord could not make a valid demand for rent at that time, given the surrounding circumstances because the rent was not owing, and in particular because of the proceedings before the RTB Arbitrator. In this case, the Landlord terminated the Tenant's lease in September 2021, subject to the referral of the issue to the RTB Arbitrator for determination. Until the RTB Arbitrator declined jurisdiction over the issue, there was an outstanding uncertainty concerning the existence of the Tenant's leasehold interest in the lands and the Landlord's assertion that the lease had ended due to breaches by the Tenant.

The Landlord asserted an entitlement to rent from November 1, 2021 to January 31, 2022 which is inconsistent even with the landlord's purported termination of the lease on November 27, 2021. In the Court's view, any claim the Landlord may have had to rent for November 2021 would have been suspended pending the decision of the RTB Arbitrator. The Court found that the parties treated the delay from initiation of the RTB process until November 19, 2021 as suspending their relationship.

3. *Does the Court have jurisdiction to reconsider the matter pursuant to section 18 or section 25 of the CTA?*

With respect to section 18 of the CTA, the Court concluded where the reasons specified for the determination of a lease and a demand for possession is non-payment of rent, and no rent was in fact owing for more than 7 days, no proper demand has been made and the application must fail.

Additionally, since the Landlord purported to terminate the lease on November 27, 2021, at the same time they demanded possession of the premise within 5 days, they were disentitled from relying on section 25 of the CTA for an order. The Court noted this is because applications brought under section 25 of the CTA presupposed the tenancy has not been determined.

Conclusion

In declining to find an implied term that rent was due on the November 1, the Court held that the tenant was not in arrears for more than 7 days when the CTA application was brought. Because section 25 is strictly construed, the Landlord's application failed for non-compliance with the statute.

Shape Abbotsford West Limited Partnership v 577374 Ontario Ltd., 2020 BCSC 1153

Facts

The plaintiff landlords were owners of a shopping centre. The tenant was a franchisee that began accruing rental arrears almost immediately upon taking possession. The tenant blamed low foot traffic at the shopping centre and hoped things would improve when a new store was added. In the interim, the parent company of the tenant entered into a supplemental tenancy agreement with the landlord to cover rent. The terms of this supplemental agreement were under dispute, but it was clear that it included some degree of "marketing costs" and rent payable by the parent. The landlord's claim arose from an alleged breach of this lease between the landlord and the tenant, and alleged breach of the related supplemental agreement between the landlord and the parent company. The landlord sought a judgment against both for $128,271.42, along with contractual interest to the date of judgment. The landlord claimed that the parent company acted as guarantor of the lease 1. The tenant denied that it was party, guarantor or indemnitor to the lease. The landlord brought an application for summary judgment and the second tenant brought a cross-application to dismiss the landlord's claims.

Issues

1. Had the parent company agreed to pay the relevant costs of the tenant's lease?
2. Did the parent company agree to pay the tenant's regular monthly rental from September 1, 2014, until the month on which the flagship store location opened (being February 2015) or to the date of termination of the Lease?

Analysis

1. Had the parent company agreed to pay the relevant costs of the tenant's lease?

The Court stated that from a common sense perspective, the requirement in the Supplemental Agreement that the $2,500 per month marketing payment be made by the Plaintiffs to the parent company and the requirement that parent commence paying regular monthly rental payments supports a finding that the Supplemental Agreement was intended to bind those parties.

The context of the Supplemental Agreement was one in which the tenant was losing money, with an obvious upstream loss to its parent. The correspondence prior to formation of this agreement suggests that the tenant was seeking to stop the bleeding in the short term, by deferring past-due rental payments owed by its subsidiary until after the new flagship store location opened, and to increase its subsidiary's sales by obtaining and utilizing the monthly $2,500 marketing contribution.

The lease required the parties to agree to any term amendments in writing, with such agreement to be signed by an authorized representative of the parties. No such written amendment exists between the landlords and tenant. Accordingly, it can not be said that the Supplemental Agreement was intended to require the tenant to pay the outstanding rental balance over a 36-month period as this would constitute an impermissible amendment to the lease.

Applying the principles set out in *RBC Dominion Securities*, despite the fact that the Supplemental Agreement did not specify who would be responsible for making the outstanding rental balance payments, the only logical conclusion to be drawn is that the parties intended that that the parent company would make these payments.

The new store opened on February 1, 2015. Accordingly, the Court found that the parent agreed to pay, and is liable to pay, the landlord $35,385.05 being the outstanding rental balance as at August 27, 2014 and pre-judgment interest on this amount accruing after February 2018 (that is, 36 months from February 1, 2015).

2. Did the parent company agree to pay the tenant's regular monthly rental from September 1, 2014, until the month on which the flagship store location opened (being February 2015) or to the date of termination of the Lease?

The Supplemental Agreement provided that the tenant's parent would commence making "regular monthly rental payments" to the landlord effective September 1, 2014. Regular monthly rental payments was not defined in the Supplemental Agreement nor was this term defined in the lease.

The Court found that the words of the Supplemental Agreement were clear and unambiguous. No reading was warranted. The parent agreed to pay the tenant's monthly rent without a specified end date. There is nothing in the evidence which would allow the Court to conclude that the parties intended that this obligation would end when the flagship store location opened.

For those reasons, the Court found that the parent agreed to pay, and is liable for, payment of the tenant's monthly rental for the eleven-month period commencing May 1, 2015 through until the end of March 2015.

3. Did the parent company agree to pay any other amounts, including contractual damages which the tenant is responsible for breaching the Lease?

As already found, the Court held that with respect to payment of rent after August 27, 2014, the Supplemental Agreement was clear and unambiguous — it required the parent to pay "regular monthly rental" and not damages arising from the tenant's breach of the Lease.

Damages

In summary, the Court granted judgment against the tenant's parent company in favour of the landlord as follows:

a) in respect of the outstanding rental balance owing on the lease as at August 27, 2014, the amount of $35,385 and pre-judgment interest on this amount accruing after February 2018; and
b) in respect of regular monthly rent payable for the month of September 2014 and for each month thereafter to and including March 2016, the amount of $67,614.14, and pre-judgment interest accruing from the date each month's rent was payable to the date of trial.

The Court granted judgment against the tenant in favour of the landlord in the gross amount of $139,794.42 with contractual interest from March 2, 2016 to the date of judgment and costs on a solicitor and own client basis to be assessed. The Court dismissed the cross application of the parent company.

Fenske v MacLeod, 2020 BCSC 532

Facts

The plaintiff tenant was a pizza business and tenant of a commercial premises. The landlord changed the lock on the back door when entering the premises to examine a water issue. The tenant claimed that the landlord repudiated lease and did not pay further rent. The landlord seized and sold equipment left on the premises claiming that it was abandoned, and that the tenant did not pay rent. The tenant brought an action for breach of the lease.

Issues

1. Did the changing of the lock constitute an interruption of the tenants' right of quiet possession in the premises such that it amounted to a repudiation of the lease?
2. If not, then what was the status of the lease in January 2016?
3. Did the tenants "abandon" the equipment?
4. If the tenant is entitled to damages, what is the quantum of those damages?

Analysis

1. Did the changing of the lock constitute an interruption of the Tenants' right of quiet possession in the premises such that it amounted to a repudiation of the lease?

The Court held that the changing of the back door lock did not constitute a repudiation of the lease. The changing of one lock was, at worst, a "temporary inconvenience" to the tenants.

The tenants had been in possession of the premises for more than two months. They had taken no steps to request a key, or replace the lock, on the front door and the landlord had no knowledge of that situation. It is clear that if the tenants had requested a new key to the back door that the landlord would have provided one. Furthermore, it is evident that the landlord did not intend to repudiate or terminate the lease in December 2016. Without that intention, the act of changing the lock on one door to gain access cannot be interpreted as a repudiation of the lease.

Changing the lock on one door interfered with the Tenants' right of quiet possession, but in a temporary manner that did not rise to the level of repudiation. It followed that the tenants were not entitled to rely on the changing of the lock as a repudiation of the lease and the lease continued into January 2016.

2. If not, then what was the status of the lease in January 2016?

The Court held that the lease terminated on January 20, 2016. As of that date, no rent was owing.

As of January 20, 2016, the landlord was in possession of the security deposit. According to the terms of the lease, the landlord was to deliver the security deposit, less any proper deductions, to the tenant at the end of the lease. The landlord did not return those funds and there is no evidence that the landlord used those funds to repair any damage to the premises. Hence, the Court found

that the landlord accepted the security deposit (which the tenant paid in September 2015) as the last month's rent. Hence, once the landlord terminated the lease, and kept the security deposit, the tenant did not owe any rent. The security deposit became the January rent payment.

3. Did the Tenants "abandon" the equipment?

The next issue relates to the rights of the tenant once the lease terminated. As discussed above, the landlord did not provide any notice to the tenants to retrieve their equipment. It is also common ground that the tenants did not contact the landlord and ask for an opportunity to take their items.

The Court reviewed the remedies available to a lessor established by the Supreme Court in *Highway Properties Ltd. v. Kelly, Douglas & Co.*, [1971] S.C.R. 562 (S.C.C.) Those options were recently restated in *Plain Jane*:

[319] In *Highway Properties*, the Supreme Court of Canada identified four mutually exclusive courses of action open to a landlord when a tenant repudiates the lease. Those options are as follows:

(a) Option 1: Affirm the lease, insist on performance. This option means the landlord can insist on specific performance and sue for rent monthly as it becomes due, or wait until the lease expires and sue. The lease is still "alive".

(b) Option 2: Accept repudiation, terminate the lease, and accept surrender of lease. The landlord cannot sue for prospective damages because the termination of lease also terminates the covenant to pay rent. Under this option the landlord must give notice of termination. After termination, the landlord may commence an action for rent accrued and for damages for breaches of the covenant up to the date of termination. The landlord may re-enter the premises if there is a provision for re-entry in the lease.

(c) Option 3: Affirm the lease, insist on performance, and re-let on the tenant's account. This option involves the landlord rejecting the repudiation, re-letting the property on the tenant's behalf and holding the tenant liable for any deficiency in the rent for the balance of the lease. This option must be set out in the lease. Rent collected from the new tenant is applied against the obligation of the old one.

(d) Option 4: Accept repudiation, terminate the lease, and give notice for a claim for the present recovery of damages, including prospective rent. This is the "*Highway Properties*" option, where the landlord provides a "*Highway Properties*" notice to the tenant that damages will be claimed for the loss of the present value of the unpaid future rent for the unexpired term of the lease - the expeCommercial Tenancy Acttion value of the remainder of the lease.

87 The lessor is required to provide notice, in part, so that the tenant knows the jeopardy he or she faces.

In the matter at hand, there was no rent owing when the landlord terminated the lease. The landlord accepted the security deposit as the January rent. Hence, there was no basis for the landlord to

seize goods for the payment of rent. Further, even if one of those contractual remedies were available in law, the landlord could not rely on it, because she gave no notice of her intention to do so.

Third, the Lessor argues that the plaintiff is estopped from claiming that his goods were wrongfully seized or distrained. She claimed that this is a case of first instance. She argues that the plaintiff "set her up" because he did not actually want his goods back. As evidence of this position, she noted that the plaintiff never requested a chance to recover his goods from the premises.

On February 15, 2016, the tenant knew that the landlord had advertised the pizza oven for sale. The tenant's lawyer sent a letter the next day but did not seek return of the oven or any other equipment. The landlord argued that the Court should infer from that conduct that the plaintiff did not want the equipment back.

The Court held that the tenant was not estopped from claiming damages. Any such estoppel would have to be grounded in a failure of the tenants to request their equipment after receiving formal notice from the landlord. The landlord provided no such notice. At best, the facts that form the basis of the "estoppel" argument would influence the measure of damages.

4. If the plaintiff is entitled to damages, what is the quantum of those damages?

Having considered the issues of the proper measure of damages, the double damages payable under the *Act*, and the defendant's argument that the damages should be halved, the Court was satisfied that

a) the proper measure of damages is the amount achieved in the sale of the equipment, without reduction for the cost of selling the goods;
b) the plaintiff is entitled to double damages under s. 10 of the *Act* based on the improper actions of the defendant; and
c) the plaintiff is entitled to full damages, not halved, or decreased for mitigation issues.

The proper measure of damages was measured at $12,180.75. That figure is doubled pursuant to s. 10 of the *Act* for a total damage award of $24,361.50. The tenant was entitled to interest on that award from the date of seizure of the equipment.

McGuire Equity Corp v Wheatland Developments Ltd., 2020 SKQB 114

Facts

The Plaintiff tenant made a written offer to Defendant landlord to lease a portion of a building for the operation of a frozen yogurt franchise. The remainder of the building was leased to RBC.

The parties made various claims.

First, the tenant claimed damages against the landlord for reduced parking. The other tenant's (RBC) lease stipulated that RBC was to have exclusive use of nine parking spots located in the common areas. The Plaintiff tenant complained that this was contrary to the lease the Plaintiff tenant, which stipulated that the use of the parking lot by the tenant would be *in common* with all other tenants.

Second, the tenant claimed that it received late possession of the premises due to the landlord's work being late in completion, which in turn made the tenant late with respect to the commencement of its fixturing. The tenant received the keys to the unit approximately three weeks late.

Third, the tenant complained that the landlord improperly charged the tenant the costs of the removal of the tenant's sign panel from the pylon sign when the tenant elected to withdraw from representation on such pylon sign.

Fourth, the tenant claimed that it had been overcharged for occupancy costs.

Lastly, the tenant wanted to place patio furniture outside its storefront for its customer's use after their purchase, and the landlord refused to permit this. The tenant claimed that the landlord had no basis to deny the tenant's ability to place patio furniture on the concrete walkway outside its storefront for its customers.

The landlord counterclaimed, seeking an injunction to prevent the tenant from placing items on the concrete walkway.

Issues

1. *Is the landlord in breach of the lease?*
2. *Should the tenant be compensated for any delay in taking possession of the leased premises?*
3. *Is the tenant entitled to compensation for its payment to remove the tenant's sign panel from the pylon sign?*
4. *Has the tenant been overcharged for occupancy costs?*
5. *Is the landlord entitled to the relief sought in its counterclaim?*
6. *What is the appropriate disposition of this action?*

Analysis

Is the landlord in breach of the lease?

The Court found that the landlord breached the lease by failing to provide non-exclusive use of the entire parking lot to the tenant and all other tenants. The lease stated the following regarding parking:

> **1.1 …**
>
> **(j) Parking:** The Landlord shall provide to the Tenant non-exclusive use of the parking lot for the term of the lease and any renewal thereof at no charge to be used in common with all other Tenants of the development. [*emphasis added*]
>
> **7.2 Common Areas**
>
> The Tenant shall have the right of non-exclusive use, in common with others entitled thereto, for their proper and intended purposes of those portions of the Common Areas intended for common use by occupants of the Building, provided that such use by the Tenant shall always be subject to such reasonable Rules and Regulations as the Landlord may from time to time determine. The Common Areas shall at all times be subject to the exclusive management and control of the Landlord.

Based on the wording of the lease, the Court found that that there was an agreement that the tenant and all other tenants had the common use of the entire parking lot with no exception carved out for the granting of the rights in favour of the tenant (RBC) who had received nine exclusive parking spots located in the common areas.

Should the tenant be compensated for any delay in taking possession of the leased premises?

The Court cited with approval the notion that the delivery of keys is the hallmark of possession. The tenant received keys to the unit approximately three weeks after the possession date indicated in the lease as a result of construction delays. The terms of the lease dealt with the issue of late possession and limited the remedy to an extension of the fixturing period and other relevant dates. However, because the tenant brought an action more than two years after the commencement of the late fixuring period, any claim for late possession was statute barred under the *Limitations Act* of Saskatchewan and was dismissed.

Is the tenant entitled to compensation for its payment to remove the tenant's sign panel from the pylon sign?

When the tenant elected to withdraw its representation on the landlord's pylon sign, the landlord charged the tenant for the removal of the tenant's sign panel.

Both the offer to lease and the lease itself were silent as to pylon signage. The prospect of such a sign occurred subsequent to the execution of those documents. A memorandum generated by the property manager was sent out and set out the fees and the pylon construction, but was silent on who was responsible for fees for panel removal. At the bottom of the memorandum was a place for tenants to indicate yes or no in terms of participating in the pylon sign.

While related to the lease, the pylon sign memorandum was found to be a stand-alone agreement. It was drafted by landlord's management company and the Court found that *contra proferentem* applied. That is, any ambiguity or deficiency would be held against the landlord being the drafter of the agreement. Since the pylon sign memorandum was silent as to who was responsible for the costs of removing any tenant's sign panel, the silence was held to be the landlord's problem. There was no meeting of the minds as to removal costs; therefore, the landlord was responsible for the removal costs, and the tenant was entitled to reimbursement of expenses relating to the pylon sign.

Has the plaintiff been overcharged for occupancy costs?

The Court found that there were certain improper additional charges related to occupancy costs relating to business overhead items that the landlord was improperly attempting to pass to the tenant and also that the management company was charging over and above its set fee of 4% as set out in the lease.

Is the Defendant entitled to the relief sought in its counterclaim?

The landlord was entitled to the relief sought in its counterclaim. The landlord sought an injunction against the tenant to prevent the tenant from placing patio furniture on the concrete walkway in front of the tenant's storefront. This area where the tenant was placing the patio furniture was common area and subject to the exclusive management and control of the landlord.

The tenant claimed that the landlord had initially agreed to this. However, it was clear that the sole control of the concrete walkway was with the landlord pursuant to the lease. Even though the landlord allowed the tenant to do this for a time, this initial waiver did not bind it for good. The injunction was granted because there was a real and substantial risk that the tenant would put items on the concrete walkway in violation of the lease without firm legal discouragement to prevent it from doing so.

Conclusion

The tenant's claims were allowed in part. The Plaintiff tenant was awarded $8,950 in damages for the loss of parking, $724.50 for reimbursement related to the pylon sign and a total of $9,229.11 for combination of occupancy costs improperly charged to the Plaintiff tenant. However, the Plaintiff tenant's claim for delay in possession was statute barred and, therefore, dismissed.

The landlord's claim was allowed in part. The claim for injunction preventing the Plaintiff tenant from placing patio furniture on the concrete walkway in front of the storefront was granted.

Unrau v 1140218s BC Ltd., 2020 BCSC 1559

Facts

The tenant commenced occupation on February 15, 2018, and paid the required monthly rent until November 2018, when it ceased paying rent and abandoned the leased premises. In April 2019, the landlord sent a letter to the tenants, demanding rent owing under the lease. No response to the demand letter was received. In May 2019, the landlord wrote a letter to the tenants indicating that they accepted the tenant's repudiation of the lease, terminated the lease and advised that they intended to claim damages. The landlords brought an action the following day the following day.

The sole live issue was mitigation.

Issue

1. Were the steps taken by the landlords to mitigate their damages unreasonable?

Held

1. Were the steps taken by the landlords to mitigate their damages unreasonable?

There was no suggestion that steps taken by the landlords to mitigate their damages was unreasonable. The Court held notice to be sufficient without any discussion as to why. The landlords met the onus on them to prove that they suffered damages as a result of repudiation of the lease by the defendants.

However, there was insufficient evidence that the landlord would actually suffer a shortfall. The more likely outcome was that the leased premises would be occupied and rent would be paid, and the landlord had not discharged its burden with respect to proving lost income.

The Court found that the plaintiffs were entitled to an award of damages against the defendants, jointly and severally, in an amount equal to the present value of the difference between (a) the amount that would have been payable under the lease during the respective terms of the mitigation leases and (b) the total amount that is payable under the current terms of the mitigation leases in respect of the areas of the leased premises covered by each of the mitigation leases. This amounts to $400,424.78, inclusive of GST.

Result

The Plaintiff was awarded damages without reduction for mitigation of expenses.

Redstone Enterprises Ltd. v FT Synthetics Inc., 2021 BCSC 1299

Facts:

The appellant Landlord (the "Landlord) and the respondent former tenant (the "Tenant") were parties to a five-year commercial lease that was set to expire in August 2022. The parties negotiated terms of early termination of the lease, effective April 2019, and came to a written agreement (the "Surrender Agreement"). Following termination of the lease, the Landlord sought payment from the Tenant of the Tenant's share of amounts the Landlord alleged were payable to it under the lease, and commenced an action against the Tenant for its proportionate share of common expenses in the amount of $25,357.61 and further repair costs of $33,973.02. The Tenant counterclaimed for return of its security deposit in the amount of $29,965.37. The Landlord's claims were dismissed, and the Tenant was granted judgment for retained security deposit. The Landlord appealed this decision. The appeal was allowed in part

Issues:

1. *Was the plaintiff Landlord entitled to additional rent for common expenses?*

2. *Was the plaintiff Landlord entitled to additional rent for repairs?*

Held:

The Supreme Court of British Columbia recognized it has broad remedial powers under the *Small Claims Act*, RSBC 1996, c 430, which this claim and counterclaim were brought under. The Court recognized the standard of appeal for matters being appealed from Small Claims Court for pure questions of law is correctness, whereas the standard for questions of fact is reasonableness, and questions of mixed fact and law are held to the standard of reasonableness, unless there is a readily extricable error in law in the trial judges reasoning, in which case the standard of review is correctness.

Under the lease, the Tenant was responsible for its "Proportionate Share" of "Common Expenses", as defined. According to the lease, the Tenant's "Proportionate Share" of "Common Expenses" was payable as additional rent within 10 days of the Tenant being notified by the Landlord of the amount for such costs. Under the Surrender Agreement, the parties agreed the Tenant would be releases from all claims, actions, and demands under the lease, however the Tenant covenanted in the Surrender Agreement to make payment to the Landlord for "all outstanding and pending Basic Rent and Additional Rent for the period up to April 30, 2019". At trial, the Tenant did not take issue with the Landlord's claims for additional rent, rather the Tenant opposed the Landlord's claims by challenging the sufficiency of the Landlord's proof of the expenses it claimed as additional rent.

In the trial judge's reasons, she noted several discrepancies and inconsistencies in the Landlord's presentation of common expenses for the three calendar years during which the Tenant operated the premises, and in the amounts claimed. The trial judge found that the figure for common

expenses provided by the Landlord's did not have any foundation and were inconsistent for two heads of costs, and there was no evidence to explain these discrepancies. The trial judge further found that costs were never collected by the Landlord for 2017 and only claimed for 2018 and 2019 after the termination of the lease. The trial judge also noted that those costs were never claimed nor collected during the tenancy. Finding no reliable evidence for common expenses, the trial judge dismissed the Landlord's claim.

On appeal, the British Columbia Supreme Court agreed with the Landlord, that to the extent the trial judge found the Landlord's evidence unreliable due to discrepancies in its evidence constituted a reviewable error. The Court noted that those discrepancies were never raised by the Tenant during cross examination nor during its closing arguments. Further, the Court held the trial judge ought not to have drawn inferences on the reliability of the documents on this basis without giving the parties further opportunity to make submissions. In fact, the Court on appeal found the discrepancies could be explained by the fact that 2018 was the only full calendar year during which the Landlord has possession of the premises. Further, the Court held the fact the Landlord did not claim the common expenses until after the termination was not relevant in this case, and in this case the Court noted it was common practice for the Landlord not to make such claims until approximately 150 days after the end of the calendar year.

Despite finding the trial judge committed a reviewable error in finding the evidence regarding the common expenses unreliable, on appeal the Court still found the Landlord's claim for common expense was unproven. Noting the trial judge's concerns, the Court on appeal still noted an absence of underlying documentation to substantiate the invoiced common expenses that were being claimed. Regardless, the Landlord had an onus to prove its claim at trial and failed to do so. The Court also noted the Landlord's failure to produce documents under a disclosure order, and the corresponding adverse inference this raised. On this basis, the Landlord's appeal was dismissed.

Similar to the common expenses, the Landlord claimed repair costs as a matter of additional rent. The Landlord conducted inspections prior to and following the Tenant's tenancy and claimed repair amounts by providing an itemized list of deficiencies it claimed were the obligations of the Tenant according to its repair obligations provided in the lease. While the trial judge held the Surrender Agreement released the Tenant of any repair obligations under the lease, on appeal the Court held the trial judge's interpretation of the lease and the Surrender Agreement raised discrete legal issues that constituted errors of law.

According to the Court on appeal, the purpose of the Surrender Agreement was to amend the lease, not to displace it. Accordingly, the two must be read together. Reading the documents together, the Court found that the exception under the Surrender Agreement include an obligation for the Tenant to pay "all outstanding and pending . . . additional rent," and that Section 6.03 of the lease required all amounts due and owning on account of the Tenant's obligations were recoverable by the Landlord as additional rent.

On this basis, the Court held the Landlord would be able to recover from the Tenant such repair costs as the Landlord incurred that were proven at trial to have arisen due to a breach of the Tenant's obligations. The Court remitted the repair cost matter back to the trial judge for her determination of whether the claims were satisfactorily proven and the costs for such repairs. With

the Tenant's security deposit being held in the Court following the trial, the Court directed if the Tenant is found liable for repairs, those amounts are to be discharged first from the security deposit, with judgement to be entered for any amounts exceeding that sum.

Conclusion:

While the trial judge made an error in determining the Landlord's evidence of common expenses were unreliable, the Court still found the landlord failed to establish its claims for additional rent due to common expenses. The Court specifically noted an adverse inference being drawn against the Landlord for its failure to produce documents under a disclosure order.

The Court held the Surrender Agreement amended the lease, rather than replacing it, and on that basis found the two documents were to be read together. On this reading, the Court found repair costs would be included in the contemplation of "additional rent", and this issue was remitted back to the trial judge for determination of the cost of repairs, and whether the Landlord's claims were satisfactorily proven.

Asara Holdings Inc. v 1041085 B.C. Ltd., 2021 BCSC 2350

Facts:

The plaintiff Landlords entered into a five-year lease agreement signed by a corporate defendant as Tenant in addition to the defendants, Bhatti and Rai as personal indemnifiers. The Tenant took possession of the leased premises for use as a pharmacy, and paid rent for the first two years of the lease, before eventually going into default and vacating the premises. The Landlords gave notice of default and took steps to re-let the premises to a new tenant. The Landlords brought an action seeking damages based on an alleged breach of the lease agreement. The Tenant and Bhatti did not file responses to claim, and the claim proceeded against Rai as indemnifier under the lease. The Landlords applied for judgment by way of summary trial. Rai personally signed the lease as indemnifier.

Rai, inter alia, claimed that at the time he signed the documents, he did not know the meaning of the term "indemnifier" and he would not have signed the document, if he had known. His intent throughout was "to be invested in the pharmacy business only" and he never intended to assume personal liability for the Tenant's obligations under the lease. Rai's business partner, Bhatti, characterized the documents as "for the business". Rai claimed relief under the doctrine of *non est factum* (described below).

Issues:

1. *Whether the matter is suitable for disposition by summary trial?*

2. *Whether Mr. Rai should be relieved from liability as an indemnifier under the doctrine of non est factum?*

3. *Whether the plaintiffs gave proper notice of the intent to seek damages for prospective loss of future rent due under the lease?*

4. *Whether the plaintiffs failed to discharge the duty to mitigate damages?*

5. *What quantum of damages were the Landlords entitled to?*

Held:

1. *Whether the matter is suitable for disposition by summary trial?*

Rai argued a summary trial is not appropriate in this case because the Court is not in a position to find the facts necessary to resolve the issues in dispute, and it would be unjust by denying him the ability to present further evidence on his claim of *non est factum* which is a highly fact-specific defence.

The Landlords noted to the Court that a party asserting *non est factum* is placed under a high burden to convince the Court that they ought not to be held to a commitment made in an otherwise binding

agreement, and this is especially the case where no evidence is led to suggest the opposing party is guilty of any involvement in the alleged failure to understand the import of the legal document being signed. The Landlords claimed Rai's affidavit evidence simply did not establish the defence of *non est factum*, and it was unnecessary for the Court to make further findings on Rai's credibility to reach such conclusion.

Assessing the Landlords' claims as against Rai's defence of *non est factum*, the Court noted it may only decide application for summary trial on its merits, and that it must be satisfied it can make the necessary findings of fact, and that resolving the matter on summary application would be unjust, considering circumstances such as complexity of the case and the amount at issue.

In this case, the issue to be determined is really Rai's liability under the lease, and specifically the viability of his defence of *non est factum*. In this case, the Court found it was capable of finding the necessary facts through the affidavits submitted to determine the issues. Similarly, the Court made no finding in this case that it would be unjust to determine the matter by way of a summary trial. The Court noted the amount in dispute was neither insignificant, nor astronomical, and that the Landlords claim in this matter was a simple one. The only substantive argument that required determination was the defence of *non est factum*.

2. *Whether Mr. Rai should be relieved from liability as an indemnifier under the doctrine of non est factum?*

It was clear from the evidence that Rai signed the lease, as an indemnified for any breach of the lease made by the Tenant. No claims have been made that the lease or the indemnity provisions are invalid on their face. So subject to Rai's defence of *non est factum*, the Court noted the Landlords will have already made out their case for finding Rai liable to indemnify the Landlords under the lease.

The Court held that it is well-recognized that *non est factum* involves a form of compromise between two competing objectives. On the one hand, there is the objective of providing relief for "a signer whose consent is genuinely lacking", and on the other hand there is the objective of protecting "innocent third parties who have acted upon an apparently regular and properly executed document." While the Court noted the validity of the doctrine of *non est factum*, it opined the doctrine should not be available to relieve a party who is guilty of carelessness in signing an otherwise valid legal agreement from liability with respect to an innocent third party.

In this case, the Court held the test for determining *non est factum* is the one set out in *Farrell Estates Ltd. v. Win Up Restaurant Ltd.*, 2010 BCSC 1752 [*Farrell Estates No. 2*]. The Court noted in Farrell Estates No. 2, the modern approach clearly mandates that sympathy for a defendant is not a factor to be taken into account in determining whether a defence of *non est factum* should succeed. The relevant factors to such a determination are the following:

1. The burden of proving *non est factum* rests with the party seeking to disown their signature. For a person of full capacity the application of the doctrine must be kept within narrowly prescribed limits.

2. The person who seeks to invoke the remedy must show that the document signed is fundamentally different from what the person believed he or she was signing.

3. Even if the person shows such a fundamental difference, the court must examine whether the signer was careless in failing to take reasonable precautions in the execution of the document. The court must also consider the conduct of the party relying on the document and whether they qualify as an innocent party, in order to determine which party, by application of reasonable care, was in the better position to avoid the loss.

In this case, Rai explained his actions according to three factors. First, Rai claimed he did not read any of the documents, claiming he has poor English literacy and reading skills. Second, Raid claimed he signed the lease documents because he trusted Bhatti, and claims he was advised by Bhatti that execution of the documents was necessary for the pharmacy business. And thirdly, Raid claimed he did not have any experience with commercial leases and did not seek legal advice before executing the documents. To that end, Rai advised he did not appreciate the meaning of "indemnifier" until after the litigation for this dispute had commenced.

In this case, the burden was on Rai to establish that the document he signed, a lease agreement in which he committed to indemnify the Landlords for any defaults of the Tenant, was fundamentally different from what he believed it to be. Considering the lease, and Rai's indemnification under it, were for the building intended to be used by the Tenant to operate its pharmacy, the Court did not find an issue with Bhatti's description to Rai that the documents were "for the business". The Court also noted that fact that Rai completed and supplied personal credit history forms at the request of the Landlords would have further indicated to Rai that his involvement in the pharmacy business brought him into some kind of business relationship with parties other than Bhatti and the Tenant, and that Rai's personal credit history was somehow relevant to the dealings at play.

The predominant thrust of Rai's argument at summary trial was that he did not read the documents based off the representations made to him by Bhatti, and that he believed the document he was signing pertained only to his relationship with Bhatti and the Tenant, rather than a document pertaining to a lease transaction with a third party, in this case the Landlords. Based upon the affidavit evidence, the Court found Rai was under a fundamental misunderstanding regarding the nature and effect of the document he was signing. Rai claimed his decision not to read the documents was due to the representations made by Bhatti and the fact he has poor English literacy and reading skills. The Court is required to assess these circumstances and others to determine whether Rai was careless in his actions, and accordingly precluded from claiming *non est factum*.

Regarding Rai's English literacy, the Court noted on summary trial application, Rai was capable of compiling and executing affidavit evidence in English without any indication he required the assistance of an interpreter. As well, the Court further noted the uncontested evidence of the Landlords that Rai was presented with credit history documents, which he filed out in his own handwriting and returned to the Landlords without difficulty. It was noted by the Court that these forms required Rai to provide detailed information such as address, assets and liabilities he possessed, and his income. In addition to this evidence, the Court further noted extensive text message communications between Bhatti and Rai concerning the business which were entirely in

English. The Court combined these pieces of evidence to assess Rai's command of the English language.

Considering Rai's admission that he did not read the documents before signing, the Court placed little relevance on Rai's claimed lack of understanding of the term "indemnifier", clarifying if it were relevant the Court would not place much weight on Rai's legal ignorance. The Court noted nothing was done to prevent or discourage him from securing legal representation to ensure he understood the legal documents, and further this was a circumstance where others felt it prudent to do so.

In conclusion, the Court held Rai was careless in his actions. The lease agreement occurred in the context of a commercial transaction, not a consumer transaction, and the Tenant was a business in which Rai had personally invested a substantial amount of money. Rai knew the business was a pharmacy, and presumably he knew space would need to be leased for its operation. While it is relevant that Rai relied on Bhatti's representations that the documents were "for the business", the Court did not find that such reliance absolved him of legal responsibility under the lease. Despite a clear ability to read and understand English documents, Rai chose not to read the lengthy lease document before executing it in the presence of an arm's length witness, nor did he seek any legal advice before executing. Considering the foregoing circumstances, the Court found Rai was indeed careless in signing the lease, and that his level of carelessness was quite high considering the significance of the transaction.

In this case, the Court found that even if there was potential misrepresentation on the part of Rai's business partner, Bhatti, through his characterization of the documents as "for the business", there was no evidence that the Landlords had anything to do with representations made by Bhatti to Rai. Ultimately, the Court concluded the Landlords played no role in Rai's misunderstanding with respect to the nature of Rai's commitments under the lease.

Based on the foregoing analysis, the Court concluded Rai's *non est factum* defence failed. While Rai subjectively held a fundamental misunderstanding regarding the nature and effect of the document he signed, Rai demonstrated carelessness in signing the document without reading it, and the carelessness was noted as substantial considering the magnitude and extent of the carelessness. Finally, the Court found the Landlords were an innocent third parties who played no role in Rai's misunderstanding of the nature of the document. **On this basis, the Court held it must give effect to the principle that a party who is guilty of carelessness in signing an otherwise valid legal document ought not to be relieved of liability vis-à-vis an innocent party.**

3. *Whether the plaintiffs gave proper notice of the intent to seek damages for prospective loss of future rent due under the lease?*

The Court noted that the giving of the notice was not a material issue in this trial, rather what was at issue was the legal character and effect of the notice that was provided to the Tenant, Bhatti, and Rai. However, in his amended response to civil claim, Rai claimed the Landlords failed to give proper notice of its intentions to seek prospective damages for loss of future rents under the lease.

With respect to providing notice when seeking damages for prospective loss of future rent under a lease, Canadian jurisprudence has held the range of damages which a landlord will be entitled to following default under a commercial lease will depend on how the landlord elects to proceed, and provided the tenant is provided proper notice of the remedies being sought by the landlord. Drawing from the decision *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd.*, 1971 CanLII 123 (SCC), [1971] S.C.R. 562 [*Highway Properties*], a landlord has four mutually exclusive options when faced with a default by a tenant:

(i) do nothing to alter or terminate the lease, insist on performance, and sue for rent or damages on the basis that the lease remains in force;

(ii) terminate the lease and sue for rent outstanding or damages incurred to the date of termination;

(iii) after giving proper notice to the tenant, re-enter or re-let the premises on the tenant's account; or

(iv) after giving proper notice to the tenant, terminate the lease and claim for rent or damages under the lease, including recovery of damages for loss of the benefit of the lease over its unexpired term.

In the case at hand, the Court recognized it is reasonable for a landlord to provide such notice to a tenant, it allows the liable tenant to take steps to rectify the situation. Specifically, the Court noted notice is especially necessary where a party played no part in the default but remain liable for the consequences of such default. In this case, Rai claimed notice was not provided because the use of the words "without prejudice to" the Landlords right "to seek all current and prospective losses and damages" arising from the breach in a letter dated February 23, 2018, was ambiguous.

However, the Court found when read in its entirety, the February 23 letter leave no uncertainty regarding the position and intended course of action of the Landlords. In particular, the Court noted the intention of the Landlords to find a new tenant to lease the space was a form of mitigation of damages for loss of future rents, and served as evidence of its intention to pursue damages for loss of rent for the remainder of the lease term. Based on the foregoing, the Court concluded the Landlords gave proper notice of their intent to seek damages from all three defendants including damages for loss of future rent under the lease.

4. Whether the plaintiffs failed to discharge the duty to mitigate damages?

Where it is alleged that a plaintiff failed to mitigate, the burden of proof is on the defendant to prove both that the Plaintiff has failed to make reasonable efforts to mitigate and that mitigation was possible. In this case, Rai failed to prove on a balance of probabilities that the Landlords did not meet its duty to mitigate. It was clear that efforts were made on the part of the Landlords to secure another tenant, and there was no effort of delay in those efforts. Similarly, no expert evidence was produced to support the efforts of the Landlords being less vigorous or intense than what was expected in the commercial real estate marker at the time. The Landlords were ultimately able to relet the unis under the lease eight months after they became vacant, and the Corut found

no evidence to establish the Landlords would have otherwise been able to further or better mitigate its damages.

5. *What quantum of damages were the Landlords entitled to?*

In conclusion, the Court held that the defendant Rai was liable to pay to the Landlords **damages totaling $119,129.85**, calculated as follows:

a) Loss of base rent from 1 February 2018 to 1 August 2019 in the amount of $97,560 ($5,420 per month x 18 months);

b) Shortfall in base rent from 1 August 2019 to 31 July 2020 in the amount of $10,836 (shortfall of $903 per month x 12 months);

c) Shortfall in base rent from 1 August 2020 to 28 February 2021 in the amount of $5,061 (shortfall of $723 per month x 7 months); and

d) GST on all rent payable ($113,457 x 5%) in the amount of $5,672.85.

Conclusion:

The indemnifier's defence of *non est factum* failed. If a landlord intends to seek damages for loss of future rent under a lease, the Landlord is required to provide notice to the allegedly defaulting tenant. Where it is alleged that a plaintiff failed to mitigate, the burden of proof is on the defendant to prove both that the plaintiff has failed to make reasonable efforts to mitigate, and that mitigation was possible. In this case, Rai failed to establish these alleged failures, and the Court found efforts to relet the unit using signs, but not including listings in newspapers, were sufficient efforts to mitigate the Landlords losses.

Siddoo v OJJJ Enterprises Ltd., 2020 BCSC 297

Facts

The defendant operated a dry-cleaning business in a commercial building owned by the plaintiff landlord. The landlord leased a gym in the unit directly next to the defendant tenants and the tenants made no complaints about noise from the gym until more than one year after the gym commenced its tenancy and operation. The tenants emailed the landlord advising that they were vacating the premises two years before the lease expired and moved their business to a new location. The tenants asserted that the covenant of quiet enjoyment had been fundamentally breached and that the landlord's failure to remedy the alleged noise issue amounted to a repudiation of the lease. The landlord brought an action for damages for breach of contract.

Issues

1. Was there a breach of quiet enjoyment and, if yes, was it a fundamental breach of the lease?
2. What damages flowed from the breach?

Analysis

1. Was there a breach of quiet enjoyment and, if yes, was it a fundamental breach of the lease?

The Court had little difficulty in concluding that the tenants were in default under their lease because they vacated the premises two years before the expiry of the lease. The tenants admitted that they left before the lease expired and did so without any notice.

The lease signed by the parties provided an express term for quiet enjoyment. The law concerning the covenant of quiet enjoyment is well settled. In *Stearman v. Powers*, 2014 BCCA 206 (B.C. C.A.) [*Stearman*] at para. 18, the Court of Appeal endorsed the succinct statement of law outlined in *Firth v. B.D. Management Ltd.* (1990), 73 D.L.R. (4th) 375 (B.C. C.A.):

> . . . To establish a breach of the covenant of quiet enjoyment the appellant [tenant] must show that the ordinary and lawful enjoyment of the demised premises is substantially interfered with by the acts of the lessor. It is conceded by counsel that the question of whether there has been a substantial interference is a question of fact. Mere temporary inconvenience is not enough -- the interference must be of a grave and permanent nature. It must be a serious interference with the tenant's proper freedom of action in exercising its right of possession: see *Kenny v. Preen*, [1963] 1 Q.B. 499 (C.A.).

The Court found that no complaints were made to the landlord about the noise issue until more than a year had elapsed following the gym moving into the adjoining unit and commencing operations. Most significantly, however, the first complaint to the landlord was not made until January 27, 2014- at least four days after the tenants began speaking with another landlord about purchasing an alternate location. The delayed timing of the initial noise complaint to the landlord and the fact that the tenants negotiated the purchase of the new location between January 23 and April 21, 2014, provided the real context for what was going on between the parties.

The Court concluded that the noise emanating from the gym was used as an excuse for breaching the lease and vacating the premises two years before the lease expired but was not the real or only cause of the defendants vacating the premises.

To succeed in their defence, the tenants had to establish that the noises emanating from the gym and the landlord's failure to do anything to remediate the matter constituted not just a breach of the covenant of quiet enjoyment but that it constituted a fundamental breach amounting to repudiation of the lease by the landlord.

The Court found that the two emails sent approximately 13 and 18 months after the soundscape changed (which had) failed to demand that the landlord do something to remediate the situation) did not constitute reasonable efforts to cause the landlord to address the noise problem.

The Court did not agree that the two emails could be read as a tenant demanding that the landlord do something about rectifying the situation and the landlord refusing to do so. To hold otherwise would invite commercial chaos and result in tenants and landlords engaging in a cat and mouse game of wordsmithing when one side wanted to end a lease prior to its expiry.

Accordingly, the Court found that the defendants failed to discharge their burden of establishing a breach of the covenant of quiet enjoyment or derogation from grant and that the landlord's conduct in failing to remedy the situation amounted to a fundamental breach of the lease entitling the tenant to treat the lease as repudiated by the landlord. The Court concluded that the tenants defaulted on their lease obligations when they vacated the premises two years before the lease expired. As the landlord has established a breach of contract by the tenants for their failure to fulfill the full term of their lease, the landlord is entitled to have her damages assessed.

2. What damages flowed from the breach?

The tenants were found liable, on a joint and several basis to the landlord for the amounts owing under the lease. The landlord's claim for the roof and plumbing expenses as part of the damages under the lease were dismissed for lacking evidence. The landlord's claim for the mitigation damages for environmental testing was dismissed as they would have been done in any case.

The landlord's claim for indemnification of her legal fees on a solicitor-client basis pursuant to the terms of the lease was also dismissed, despite the lease prescribing such costs, as the landlord had taken no steps to investigate and rectify the noise issue, stating that it was "not a landlord issue". On that basis, the landlord lacked clean hands and the Court awarded costs under court-established scales.

Conclusion

The landlord's action was allowed. The tenants breached the term of their lease by vacating the premises two years before the lease expired. The tenants failed to establish that the noise from the gym and the landlord's failure to resolve and ameliorate amounted to a fundamental breach of the covenant of quiet enjoyment or derogation from grant, so they were not entitled to treat the lease as repudiated or vacate the premises two years before the lease expired.

Calgary Fleet Maintenance Ltd v 1330425 Alberta Ltd., 2019 ABQB 518

Facts:

An oral offer to lease (the "**Oral Offer**") pursuant to a very short written agreement in principle (the "**Original Agreement**") set out rent payable and expressly contemplated a written lease. Calgary Fleet Maintenance Ltd. (the "**Tenant**") made renovations and improvements to the subject premises (the "**Premises**") of approximately $20,000.00 before moving in, and it took possession from 1330425 Alberta Ltd. (the "**Landlord**") in April 2013.

A lawyer drafted a commercial lease agreement (the "**Draft Lease**") in October 2013, but the Draft Lease was not signed by either party and it was not clear which party was the client. The Draft Lease was considered by both parties, and changes were made and initialed by the parties, along with other notes, including questions. In the end, the Draft Lease was never signed by either party. Nonetheless, pursuant to the Draft Lease, the Tenant claimed it held a valid five-year lease with five-year renewal option (the "**Renewal**") , although the renewal clause was not in the Oral Offer or orally discussed in the Oral Agreement, and the Tenant gave notice in an effort to renew the Draft Lease.

The Landlord admitted in cross-examination that there was an oral five-year agreement. The Landlord asserted that its initials in the Draft Lease were simply acknowledgements that the changes were acceptable, but not that the entire Draft Lease was being consented to.

The Tenant argued that the Draft Lease was initiated by the Landlord and that it was sufficient to satisfy the *Statute of Frauds*, 1677, 29 Car. 2, c.3. Further, the Tenant argued that the payment of rent was in accordance with the Draft Lease and not the Original Agreement, and that various aspects of the parties relationship constituted part performance. Finally, the Tenant argued that the law of promissory estoppel applied and it was entitled to the Renewal.

Issues:

1. Did part performance or promissory estoppel apply?
2. Was the Renewal term in the Draft Lease enforceable?

Held:

1. Did part performance or promissory estoppel apply?

The Court considered that the renovations to the Premises that the Tenant conducted were done before the Tenant had moved in and months before the Draft Lease containing the Renewal was put forward to conclude that, at the time the improvements were made, the Tenant at best considered that he had a right to occupy the Premises for five years. Further, the Court rejected the Tenant's argument that rent was indicative of the parties' intentions to adopt the terms in the Draft Lease. Instead, the Court found that the parties had changed the rent amount, which had been the only written term in the Original Agreement, by oral agreement. The Court further noted that a lack of any signature on the Draft Lease allowed either party to disclaim its obligations under the Draft Lease.

The Court concluded that the doctrine of past performance is a kind of estoppel, whereby the *Statute of Frauds* cannot be relied upon if the Landlord had, by conduct or words, admitted an

agreement between parties and the parties conduct had clearly and unequivocally reflected this agreement.

However, after considering the continued occupation, the fact that the tenant obtained insurance, and the fact that the Tenant occupied the Premises for the purposes intended, the Court decided that these actions were not unequivocally referable to the presence of a Renewal. Instead, the Court ruled that these facts were consistent with a month-to-month tenancy, or a five-year oral agreement, which had expired.

2. Was the Renewal term in the Draft Lease enforceable?

The Court also applied *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd*., 2019 ABCA 49 to determine that the matter was appropriate for summary judgment. The Court concluded that the main factual conflict was over who had instructed the lawyer to prepare the lease agreement, which was irrelevant as the rule of *contra proferentem* did not apply to the present facts. The evidence indicated that both the Tenant and the Landlord recognized that the Draft Lease was never completed, but instead was a work in progress. The Court considered the intention of the Landlord to have a "sit down" with the lawyer, the presence of questions in the margins, and the fact that the Renewal had not been discussed with the Landlord but was unilaterally introduced by the Tenant.

The Court considered *Austie v. Aksnowicz,* 1999 ABCA 56 and *Peters v. Wilson Estate*, 2011 ABQB 665 to address situations where an unsigned, or partially signed, contract lent itself to a conclusion of part performance and determined that the Draft Lease was simply a draft.

Conclusion

The Court allowed summary judgment and the claim was dismissed, as the Draft Lease was unenforceable and the Renewal term did not bind the parties. Costs were to be decided by the parties or referred to the Masters' chambers clerk if they could not agree.

Ambassador Coffee Inc. v Park Capital Management 2012 Inc., 2019 SKQB 65

Facts:

This dispute was brought as a summary judgment application by the Landlord.

Pursuant to a lease agreement dated August 9, 2013 (the "**Lease**"), the plaintiff, Ambassador Coffee Inc. (the "**Landlord**") leased to the defendant, Park Capital Management 2012 Inc. (the "**Tenant**") the second floor of a commercial building (the "**Premises**") for a term of five years (the "**Term**").

Midway through term of the Lease, the Tenant stopped paying rent and purportedly subleased the Premises (the "**Sublease**") to Ranch Ehrlo Society (the "**Subtenant**"). Although the Landlord claimed it did not consent or authorize the Sublease, it nonetheless accepted payments in order to mitigate its alleged loss of revenue from Tenant's lease arrears.

There was a dispute relating to whether the Tenant paid appropriate amount of rent before it purported to entering into the Sublease.

The Lease expired and the Landlord sought judgement of $88,776.59 for breach of contract arising from the amounts it alleged the Tenant failed to pay pursuant to the terms of the Lease. The Tenant argued that the Landlord misrepresented the terms of the Lease which enticed the Tenant to enter into the Lease. In the alternative, the Tenant argued the at the Landlord should be estopped from insisting on being paid the full amount because the Landlord had accepted a lesser amount prior to the Tenant vacating the Premises. Finally, the Tenant submitted that the Lease was waived or modified by an oral agreement, making all past and future obligations of the Tenant forgiven in exchange for consent to the Sublease.

Issues:

1. Was the Lease valid?
2. Was the Landlord entitled to operating costs?
3. Was the Landlord entitled to a security deposit?
4. What were the additional operating costs if the Subtenant exercised its option to extend?
5. What were the legal fees?
6. How should interest be calculated?

Held:

1. *Was the Lease valid?*

The Tenant argued that it was enticed into signing the Lease by a misrepresentation (regarding operating costs) made by the Landlord, and that recessionary relief should be available. Citing *Kingu v. Walmar Ventures Ltd*. (1986), 10 B.C.L.R. (2d) 15 (BCCA), the Court determined that the Landlord had not made any fraudulent misrepresentations leading up to the signing of the Lease, and that any misrepresentations made would have been non-fraudulent or "innocent".

The Court ruled that the evidence showed that the parties contemplated operating expenses over and above base rent, and that a summary sheet, which did not show variable operating costs, was only meant as a brief overview and that the Lease was a fulsome document which elaborated and expanded on the "bare bones" offered in the Summary Sheet. The Court did not find that the Summary Sheet contained any deception or misrepresentation on the Landlord's part, and a diligent review of the Lease prior to signing would have clarified the Tenant's obligations regarding the operating costs. Further, the evidence was that the Tenant reviewed a draft Lease and proposed some changes, particularly regarding operating costs, which was inconsistent with any alleged misrepresentation. There was no evidence that the Tenant was unsophisticated or unable to appreciate the significance of signing a formal lease.

The Tenant also argued that the doctrine of promissory estoppel should be applied to prevent the Landlord from enforcing its rights under the Lease. However, the Court rejected this argument for two reasons. Firstly, citing *Dunn v. Vicars*, 2009 BCCA 477 (B.C. C.A.) at para 53, the Court noted that neither this defence nor the material facts were pled in the Tenant's statement of defence. Secondly, relying on *Rock Developments (Price Albert) Inc. v. Carlton Spur Development Corp*., 2017 SKQB 247, the Court noted that there was no factual basis for the Tenant's application.

Further, the Tenant contended that, if the Lease was valid, the Lease was waived or modified by an oral agreement with consideration, despite several provisions of the Lease which specified that written consent of the Landlord was required to sublet, and that all modifications to the Lease must be in writing and signed by both parties. The Court further noted that a waiver of this nature would be inconsistent with commercial realities, citing *First Place Tower Inc. v. Borneo Gold Corp.*, [2000] O.J. No. 4294 (Ont. S.C.J.). Considering the evidence, the Court decided that, on a balance of probabilities, there was no oral agreement to waive the Lease between the Landlord and the Tenant.

Thus, the Court found that there was no basis to conclude that the Lease was void or should be rescinded, or that the Landlord should be estopped from relying on written terms contained in the Lease.

2. *Was the Landlord entitled to damages for operating costs?*

The Court found that the Tenant had not paid actual operating costs due from July 1, 2016 to December 30, 2017, as required under the lease. Based on uncontroverted evidence, the Court concluded that the Tenant owed $15,568.81 in actual operating costs up until December 30, 2017.

3. *Was the Landlord entitled to a security deposit?*

The Landlord claimed that a $5,000.00 security deposit should have been paid by the Tenant pursuant to the terms of the Lease, but that this was not done. The Court noted that a security deposit is "a deposit of money tendered by the tenant to the landlord to ensure that rent is paid and the other responsibilities under the Lease are performed" (at para 97). The Court ruled that the security deposit was no longer due as the Term had expired and there had been no breaches. As such, the security deposit would have been returned to the Tenant as required by the Lease and a

non-payment of the security deposit does not create a loss. Thus, the Court concluded that the Landlord was not entitled to claim the security deposit as damages.

4. What were the additional operating costs if the Subtenant exercised its option to extend?

The Tenant purported to provide an option to the Subtenant to extend the Sublease for an extra six months. The Landlord claimed that if the Subtenant had exercised this option, the Landlord would have incurred a shortfall of six months. The Court rejected this argument as there was no information on whether the Subtenant exercised this option, and a tenant cannot lawfully extend a subtenant's lease beyond that of the primary lease, and any purported extension by the Tenant would be unenforceable against the Landlord. Thus, the Court concluded that damages were not available under this head of damage.

5. How should costs be calculated?

The Court stated that the Lease provided that the Tenant was responsible for all legal costs and charges incurred in enforcing payment of monies owed under the Lease. Specifically, the Lease stated:

> (b) The Tenant shall pay and indemnify the Landlord against all legal costs and charges, including counsel fees, lawfully and reasonably incurred in enforcing payment of Rent and all monies due and owing under this Lease Agreement, and in obtaining possession of the Leased Premises after default of the Tenant, or upon expiration or earlier termination of the Term of this Lease or in enforcing any covenants, provisos or agreements of the Tenant herein contained.

On this basis, the Court concluded that the Landlord was entitled to solicitor-client costs, plus appropriate disbursements.

6. How should interest be calculated?

Upon examination of the Lease, the Court noted that the Lease provided two options for calculating interest, with no guidance on how to determine which option would apply. The Court found that the interest provision in the Lease was ambiguous and did not comply with the requirement to state the annual equivalent of a monthly interest rate. Thus, citing *Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd.*, 1991 ABCA 351, [1992] 1 W.W.R. 577 (ABCA), aff'd [1994] 1 S.C.R. 552 (SCC), the Court applied the *Interest Act*, RSC 1985, c I-15 (the "*Interest Act*"), s 3, and set the interest rate at 5% per annum.

Conclusion:

The Court found that summary judgment was appropriate as there was no genuine issue requiring a trial. The parties had entered into a valid Lease and the Court had no basis for not enforcing the terms within, except for the interest provision. The Tenant had breached the Lease and the Landlord was entitled to damages for unpaid variable operating costs, unpaid actual operating

costs, interest at 5% pursuant to the *Interest Act*, and costs on a solicitor-client basis with appropriate disbursements.

Illingworth v Evergreen Medicinal Supply Inc, 2019 BCSC 1148, aff'd 2019 BCCA 471

Facts

In this case, the landlord, Philip Illingworth (the "Landlord"), was the owner and landlord of a commercial premises located in Central Saanich, just north of Victoria, British Columbia (the "Premises"). The respondent tenant Evergreen Medicinal Supply Inc. (the **"**Tenant"), signed a lease with the Landlord for the Premises for a stated term of five years, commencing on January 1, 2014, with an option to renew for further term of five years. The Landlord alleged that the Tenant failed to pay back rent owing from a period from January 2014 to February 2017, as per the terms of a Commercial Lease (the "Lease"). As such, the Landlord brought a petition seeking declaratory relief and an Order for a Writ of Possession, pursuant to sections 18-21 of the *Commercial Tenancy Act*, RSBC 1996, c 57 (the "Act").

The Tenant denied that it owed rent on the grounds its payment obligations did not commence until it had obtained occupancy, as per the following term in the Lease:

> 6.10:
> If the demised premises shall not be available for occupancy by the Tenant upon the date of commencement of the term hereby demised, the rent under this lease shall abate *until the demised premises are available for occupancy* and the Landlord shall not be liable in any way for the consequences of occupancy not being available to the Tenant upon the date of commencement (at paragraph 27) [emphasis added].

The commencement date of the Lease was January 1, 2013 and that it was intended the Lease terminate on January 1, 2018, or continue for another five (5) years upon a renewal.

The Tenant took two different positions with respect to occupancy during the course of the proceedings, originally asserting that occupancy occurred when its operation was issued a federal license to produce marijuana, and subsequently arguing that occupancy did not commence until a municipal occupancy permit for the Premises was granted, in August 2017. In the alternative, if the Tenant was in breach of its payment obligations, the Tenant argued that it should be granted relief from forfeiture as the Lease was still effective pursuant to the renewal clause.

The Landlord had previously brought a petition before the Court concerning these issues (the "First Petition") in an attempt to obtain an Order of Possession. In the First Petition, the Court determined, that the Landlord had "expressly stated", in a communication to the Tenant that back rent was not due until the Tenant had obtained the requisite license for the production of medical marijuana, and that the Landlord was estopped from terminating the lease merely because the Tenant had failed to pay (at para 9).

The Landlord appealed the decision of the Court, which was heard by the British Columbia Court of Appeal. In its decision, the Court of Appeal upheld the lower Court's decision on estoppel, but set aside the conclusion that there had been abatement of rent, as the issue was not properly before the Court. The Court also determined that "the parties signed a five-year lease commencing on January 1, 2014" (at para 14). As a result of the Appellate decision, the Landlord delivered a

demand to the Tenant for payment of Rental arrears in the amount of approximately $348,000.00 in principal, plus $98,000.00 in interest. The Tenant did not respond, and the Landlord took steps to hire a bailiff and served a notice of termination, and subsequently brought a second Petition (the "Second Petition") for declaratory relief, and a writ of possession.

Issues

1. Was rent abated?
2. If rent was not abated, was The Tenant entitled to relief from Forfeiture?
3. Did the Landlord's application amount to abuse of process?
4. Was the Tenant in wrongful possession of the Premises?

Held

On the basis of the totality of the evidence, the Court granted relief declaring that the Tenant was wrongfully in possession of the Premises. The Court also provided a writ of possession pursuant to section 21 of the *Act.* Finally, the Chambers Judge determined that there was no basis to the Tenant's allegations of abuse of process.

1. Was rent abated?

The Tenant took the position that rent was abated until at least March 2017, arguing that section 6.10 of the Lease allowed for deferral of rent until the Tenant obtained a license to produce marijuana.

The Court found that the Lease did not specifically contemplate abatement until the time of the Tenant's satisfaction of requisite licensing requirements, or specifically enumerate a definition for occupancy. The Tenant took other steps during the course of its interactions with the Landlord that further compromised its position with respect to abatement. The Court determined the Tenant made representations via text message that specifically contemplated its repayment obligations for months of rent that were in the period of alleged abatement. The Tenant, through its representative, sent text messages asking for confirmation about amounts owed for rent.

As the Lease itself did not specifically contemplate the Tenant obtaining the requisite licensing to run its business in the phase "available for occupancy" the Tenant had no basis for claiming the abatement period that it put before the Court. The Court found Tenant's occupancy commenced in January 2014, and the Court determined that the Tenant obtained benefit from its occupancy through the alleged abatement period. Since there was no abatement of rent, the Tenant was in fact not paying rent for a period ranging from January 2014 to March 2017 and was therefore liable for rent accrued within that time frame.

2. If rent was not abated, was The Tenant entitled to relief from Forfeiture?

According to precedent in British Columbia, set out in *Amadon Properties Ltd, v Pacific Apparel Inc*, [1990] BCJ No 2115 (SC) ["*Amadon*"], relief from forfeiture will not be granted if a lease has

expired and 'no effectual relief from forfeiture could be granted in the circumstances (citing *Coventry v McLean* (1894), 21 OAR 176 (CA) [emphasis added].

Competing interpretations about the term of the Lease were put before the Court. Some evidence was led demonstrating the Lease commenced, for a term of five years, on January 1, 2014 and ending on the December 31, 2019. Specifically, the Court found, as a matter of fact, the 2019 date was stipulated in the cover sheet and in one part of the Lease. However, if true, that would have meant the Lease was effective for six years instead of five. Consequently, had the Lease been effective in 2019, the Landlord would have had to prove the Lease was breached. But, if the Lease was not effective, then the precedent from *Amadon* would have prevented any claims for relief from forfeiture in their entirety.

The Court found that since the Lease specifically stated it was a five year lease, commencing on January 1, 2014, the subsequent article within the Lease stipulating a termination date of December 31, 2019 was in fact a typographical error. Further, the payment schedule within the Lease only contemplated payments over a five year period; it did not consider payments in a sixth year.

There was some further discussion with respect to the status of the Lease, as the Tenant argued it had sent a Notice of Renewal in 2018. The Court found this actually strengthened the Landlord's position with respect to termination date, drawing an inference that the Tenant sent a notice of renewal in 2018 because it believed the Lease was to terminate at the end of 2018.

The Tenant attempted to invoke the rule of *contra proferentem* but was unsuccessful as the Court found the evidence of the parties' intentions was reflected through the Lease. Further, the Landlord relied on the Supreme Court of Canada's decision in *Canadian National Railway Co v Royal and Sun Alliance Insurance Co of Canada*, 2008 SCC 66, for the proposition the rule of *contra proferentem* is meant to be invoked as a last resort and only in cases where the general principles of interpretation have failed. While the Court did not specifically opine on this point, it also did not apply the rule in favour of the Tenant.

As such, the Court determined that based on the evidence of the parties' intentions to be bound for a term of five years, commencing on the January 1, 2014, and the discrepancy in termination dates being a typographical error, there was no support for the Tenant's position that the Lease was still effective at the time of the decision. Therefore, the Lease had expired and was not renewed, so there was no relief to be derived from forfeiture. The Court then opined on the impact an effective Lease would have on this point stating that because the Tenant did not pay rent for three years of a five year lease they would not have been entitled to relief from forfeiture in any event.

3. *Did the Landlord's application amount to abuse of process?*

The abuse of process claim was grounded in the Landlord's conduct insofar as he had commenced a separate civil action with respect to allegations of entitlement to a share of the Tenant's business. The Tenant alleged that the petition at bar was an attempt to apply leverage on the Tenant and compel it to provide an interest in its corporate body.

The Court found that there was some discussion between the parties with respect providing the Landlord with an interest in the Tenant's venture and from that there was no merit in the Tenant's abuse of process claim. There was no inconsistency between the pleadings in the Second Petition and the Civil Claim.

4. *Was the Tenant in wrongful possession of the Premises?*

As the above arguments all failed, Mackenzie J., granted the Landlord's request for declaratory relief with respect to the Tenant not being legally in possession of the Premises.

Conclusion

The Court found there was no abatement period as the circumstances failed to fall under the prescribed section in the Lease; that the Lease had terminated, and was not renewed in any event, therefore, there was no relief from forfeiture; there was no abuse of process; and the Tenant did not have lawful possession of the Premises. As such, the Court granted the Landlord's application for a writ of possession, and provided declaratory relief finding the Tenant to be wrongfully in possession of the lands and the Premises. the Tenant owed monies for unpaid rent, plus interest.

2189252 Alberta Inc (Tutti Fruitti Breakfast & Lunch) v Harvard Developments Corporation, 2021 ABQB 977

Facts

The lease between the tenant breakfast restaurant and the landlord specified that payments were due on the first of each month. After 10 days of default, an additional 3 months accelerated rent became due and the landlord gained a right of re-entry to the premises. The tenant fell behind on its rent, paying only half rent for several months and never making the payment deadline of the first of the month. In September 2021, the landlord sent a demand for the full arrears owing, payable by the 17th of that month. The tenant paid that amount, but not until September 23rd, 2021. In the interim, the landlord changed the locks on the premises and took possession on September 20th, but did not deliver written notice of termination until September 23rd. The tenant then filed an originating application seeking a declaration that the lease had been breached.

Issues

1. Did the landlord breach the lease by re-entering and taking possession?
2. Was the landlord precluded from enforcing the lease by estoppel or waiver?
3. Should the tenant be relieved from forfeiture?

Held

1. Did the landlord breach the lease by re-entering and taking possession?

The tenant's primary argument was that the landlord had breached the lease by taking possession prior to delivering written notice of default, and that by the time such notice was delivered the tenant had cleared its arrears by paying the amount noted in the demand. The Court found that the first principle had no support in either case law or the lease. As to the second principle, because the tenant had not paid the arrears by the deadline set in the demand it was obligated to pay the full amount owing plus 3 months rent, under the terms of the lease. Therefore, the tenant had never actually cleared the full amount owing, so the landlord was well within its rights to re-enter.

2. Was the landlord precluded from enforcing the lease by estoppel or waiver?

This was the bulk of the tenant's argument, and the tenant offered several points to support this point.

The tenant argued the landlord had agreed to accept 50% of the rent for a period of time while the restaurant was under stress (presumably, though this is not stated, due to the COVID-19 pandemic). However the only evidence of this was the tenant's manager's testimony that there had been agreement on this point. Against this was an array of documentary evidence comprised of communication between the parties and demand letters sent by the landlord. The emails showed the tenant repeatedly requesting a 50% reduction in rent and the landlord explicitly rejecting this request. The landlord sent 5 demand letters over the course of early 2021 requesting payment of the arrears. The tenant's manager in examination avoided questions about

who exactly he had agreed to this reduction with. In one email he referred to himself as a "rent defaulter", but in questioning denied that he had ever defaulted. The Court held that there was no agreement to reduce rent as between the parties.

The tenant then argued that the landlord accepting the 50% rent cheques it had sent for a number of months constituted waiver. The Court did not so find, and distinguished case law advanced by the tenant as follows:

> [40] The four cases relied upon by the tenant stand for the proposition that acceptance of rent in full may waive past breaches of a lease. None of them states that acceptance of partial rent waives future breaches. The obiter comments in *Groenveld* come close, but in that case, there was no evidence that the landlord had accepted partial rent while insisting that the full rent was owing.
>
> [Emphasis in original]

Third, the tenant submitted that the landlord issuing demand letters for payment in full waived its right to terminate for non-payment. On the language of the demand letters, the Court disagreed, holding:

> [48] The cases relied upon by the tenant do not stand for the general proposition that any demand for payment of an amount owing under a contract will always waive a party's right to terminate the contract based on that non-payment. The general test for waiver remains, as set out in ***Saskatchewan River Bungalows***:
>
> > [20] 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.
>
> [49] In this case the landlord's demand letters show the opposite: an unequivocal and conscious intention not to abandon its right to terminate. For example, the January 11, 2021 demand letter reads:
>
> > We require that the outstanding balance be paid immediately upon receipt of this letter and in any event no later than January 20, 2021. If payment is not received on or before this date, please be advised that the Landlord may initiate whatever action to remedy said default that it has available under the lease.

The tenant then attempted to say the benefit to the landlord from the tenant's partial payment estopped it from enforcing the lease. The landlord invited the Court to take judicial notice of the fact that the landlord could not have found a new tenant during the pandemic and therefore benefitted from the partial lease payment scheme. The Court declined to do so, the point never having been raised in questioning by the landlord's counsel and, in any event, disagreed with the proposition that benefits to the landlord constitute waiver of the right to terminate.

Finally, the tenant argued that there had been an agreement to work on a payment plan between the parties. The landlord's employee expressly denied ever having so agreed. As above, there was evidence of the tenant's desire to work on a payment plan but no evidence that the landlord had agreed to discuss one. The landlord's witness evidence was that they were not entertaining payment plans at that time.

In the result, none of the proposed grounds for waiver or estoppel were made out.

3. Should the tenant be relieved from forfeiture?

Citing *Saskatchewan River Bungalows Ltd. v Maritime Life Assurance Co,* [1994] 2 SCR 490, the test for relief from forfeiture is 1) the applicant's conduct must be reasonable; 2) the object of the forfeiture was essentially to secure payment of money and; 3) a substantial disparity between the value of property forfeited and the damage caused by the breach.

The Court decided this issue solely on the first ground of the test, holding that the tenant's conduct was unreasonable and it was therefore not entitled to relief. Correspondence showed that the tenant's constant tardiness on its rent payments was simply the result of it deciding that it no longer needed to make that obligation, and it could decide to pay in the middle of the month if it so desired. It never attempted to meet that obligation, despite the landlord's consistent reminders to do so. Under the lease the tenant was also required to provide monthly gross income figures to the tenant. While the landlord did not insist on strict compliance with the lease, it did make regular requests for some information. Further, when the tenant did provide monthly sales figures, these were substantially lower than the figures provided in evidence at trial. The Court found the tenant had grossly underreported its income while asking for a rent abatement. On this basis, the tenant's conduct was held to be unreasonable and it could receive no relief.

Result

The tenant's action was dismissed, with solicitor and client costs pursuant to the lease.

Barefoot Community Association v Saanich (District), 2021 BCSC 2241

Facts

The plaintiff tenant used a community centre to provide social services. The defendant municipality and granted the use of the community centre to the plaintiff via a series of leases and extensions. The property and community centre were owned by the defendant landlord and the current lease was set to expire. The landlord advised the tenant that there would be no additional leases or extensions. The tenant applied for an interim injunction restraining the landlord from interfering in its use of the community centre until conclusion of the trial. The tenant relied on proprietary estoppel.

Issue

The starting point for the plaintiff's application for an injunction is the leading decision of *RJ-MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.J. No. 17. It sets out a three-part test for an injunction:

1. Is there a serious issue to be tried;
2. would the applicant suffer irreparable harm if an injunction was refused;
3. does the balance of convenience favour the gravity of an injunction?

Analysis

1. Is there a serious issue to be tried?

The Court considered the specific legislation referred to in the lease, particularly s.175 of the *Community Charter*.

Section 175(2) says that:

Subject to subsections (4) and (5), if an agreement under subsection (1) is
(a) for more than 5 years, or
(b) for a period that could exceed 5 years by exercising rights of renewal or extension,
the council may only incur the liability with the approval of the electors.

The Court found that there were significant constraints on a municipality like the defendant when undertaking liabilities including leases. Further, there has been a consistent threshold of five years beyond which approval of the electors is required. The language in the lease did not mean that there would essentially be an automatic renewal of the lease every year and there was no implied term that the lease would be renewed each time. Although a 20-year lease was discussed, the tenant knew it had been specifically rejected as something to take to the electorate.

For these reasons, the tenant did not meet the first step for an injunction, whether that is a serious issue to be taken to trial or a strong *prima facie* case. It simply was not available to the landlord to agree to any lease for a term longer than five years. Anything more without the approval of the

electorate would have been a breach of the governing legislation. It was not a matter of interpretation, it is what the legislation said. The Court added that even if a lease had been agreed to for five years, that would have been contrary to the legislation, not a valid exercise of the defendant's discretion, and it would have even been to the peril of the plaintiff, Canada Safeway v. Surrey (City), 2004 BCCA 499, at para. 22, and Pacific National Investments Limited v. Victoria (City), [2000] 2 S.C.R. 919, at para. 55

These conclusions were sufficient to dispose of the plaintiff tenant's application.

Held

The plaintiff tenant's application of August 6, 2021, for an interim injunction against the defendant landlord was dismissed. Neither party obtained costs against the other.

Windsor-Essex Catholic District School Board v. 231846 Ontario Limited, 2021 ONSC 3040

The tenant school board leased athletic facilities from the commercial landlord. Due to the COVID-19 pandemic and the resulting lockdowns, the landlord was forced to close the property and the tenant was unable to use the facilities.

The tenant stopped paying rent and brought an application asking the Court to declare that, due to *force majeure*, the tenant was not required to pay rent during the closure.

The tenant argued that the *force majeure* clause in the lease allowed for rent to abate while a *force majeure* event occurred. The provision in the lease provided that "there shall be an abatement of rent and additional rent if the force majeure provisions of the [clause] are applicable…". It also provided that a force majeure event included "restrictive governmental laws or regulations".

The landlord argued that, since the provision provided that the clause is only triggered "[i]n the event the [l]andlord claims a Force Majeure has prevented the [l]andlord from enabling the [t]enant to make use of the Leased Premises or operate its programs…", rent should not abate (as it never claimed that a force majeure existed).

The Court held that a force majeure clause is a contractual term that has no specialized meaning at law outside of the provision. Whether or not such a clause is triggered, and if so, its effect, depends on the interpretation of the clause. The Court held that one "cannot over-emphasize that each case turns on the wording found in the contract".

Read as a whole, the Court found that the closure of the premises in response to the pandemic constituted a force majeure event. It focused on three key points: (1) the triggering event; (2) the required impact; and (3) the effect on contractual obligations.

With respect to the triggering event, the force majeure clause set out the triggering events and included "restrictive governmental laws or regulations". The Court concluded that the restrictions put in place by the government in response to the COVID-19 pandemic fit under this category. Therefore, the Court found that the closure of the facilities was a triggering event within the meaning of the provision.

The Court also considered whether there was a required impact from the triggering event. The lease provided that "… if either party hereto shall be bona fide delayed or hindered in or prevented from the performance of any term, covenant or act required hereunder by reason of [the triggering event] ….". Given that the landlord was unable to provide the leased premises to the tenant during the relevant period, the required impact under the lease, the Court determined that the criteria was satisfied.

Lastly, the Court considered the effect of the impact on the parties' contractual obligations. The parties explicitly allocated the risks between them. They listed the events that would constitute a force majeure and the effect that the triggering event would have on each party's contractual obligations. Pursuant to the terms of the provision, during a *force majeure* event, the landlord was excused from its obligation to provide the leased space to the tenant, and the tenant was excused from paying rent during that relevant period.

The landlord appealed the trial judge's decision.

Braebury Development Corporation v Gap (Canada) Inc, 2021 ONSC 6210

The tenant leased premises from the landlord to operate a retail clothing store. Government restrictions regarding COVID-19 impacted the tenant's ability to pay rent.

In March 2020, Ontario declared a state of emergency and ordered non-essential businesses closures to limit the spread of COVID-19. The tenant ceased operations and only re-opened when the restrictions were partially lifted in May 2020. The tenant missed rent payments in April and May 2020. It made partial rent payments from June to September 2020. The tenant argued it was not required to pay rent because its lease obligations were frustrated by COVID-19. The landlord argued rent was payable because of a *force majeure* clause in the lease, which explicitly carved rent payments out of the tenant's relieved obligations in the event of a *force majeure* event.

In September 2020, the tenant unilaterally closed its store and vacated the premises. The landlord brought a motion for summary judgment seeking $208,211.85 in rent arrears.

The Court found that the *force majeure* clause applied and that the tenant was not relieved of the obligation to pay rent. The presence of a *force majeure* clause refuted the tenant's argument in favour of the doctrine of frustration.

The Court stated that to determine the effect of a *force majeure* clause, three aspects of the clause must be reviewed: (i) the triggering event, (ii) the required impact on the parties, and (iii) the consequences of that impact on the invoking party's contractual obligations.

The Court determined that there was a triggering event. The *force majeure* clause excused the landlord and tenant from certain obligations if performance was hindered by "restrictive governmental laws or regulations" or other reasons "of a like nature". However, it expressly did not excuse the tenant of the obligation to pay rent. The tenant argued the clause did not apply as it failed to explicitly list pandemics and public health emergencies as trigger events, and therefore COVID-19 restrictions are also not of "a like nature". The Court rejected this argument after reviewing recent case law holding that, while the COVID-19 pandemic was not itself a *force majeure*, the associated government restrictions could be if the clause contained the appropriate language. The clause before the Court met this threshold.

The Court also found the required impact was met, which required that either party "be delayed in or prevented from the performance of any act require under the lease". The tenant argued that paying rent was not an "act under the lease" and the *force majeure* clause did not apply. The Court rejected this argument. The tenant provided no support for this position. Instead, the Court accepted the landlord's argument for a common-sense approach. If the payment of rent was not an "act" under the lease, carving it out of the *force majeure* clause would be redundant.

Consequentially, the Court found that the tenant was required to pay rent.

The Court refused to apply the doctrine of frustration. Frustration occurs when (i) a new situation makes performance "radically different" to the original contractual obligations, and (ii) the parties failed to draft for such a situation. The tenant argued that COVID-19 restrictions radically altered its obligation to operate a retail premises. However, the lease permitted the tenant to use the premises for other purposes than solely retail, meaning the tenant could not argue that the inability to operate a retail premises was "radically different" than its obligations. In any case, the Court

accepted the landlord's argument that the existence of an applicable *force majeure* clause refutes the doctrine of frustration, as it necessarily meant the parties considered the outcome and drafted accordingly.

The Court granted the landlord's motion for summary judgment.

Ontera Inc v De Beers Diamond Jewelers (Canada) Ltd, 2019 ABQB 926

Facts

The Landlord and its agent Ontera Inc (the "Landlord") owned and operated a large retail mail in Calgary, Alberta. The defendant, De Beers Diamond Jewelers (Canada) Ltd (the "Tenant") initially intended to lease approximately 1,286 square feet of space in the Landlord's shopping mail (the "Premises").

The Tenant entered into a detailed letter agreement called an "offer to lease premises" (the "Offer to Lease") dated July 28, 2015. The Offer to Lease contained reference to an intended commencement date in 2017, with the possibility of commencement occurring as late as mid-2018. The Tenant never expressed an objection or disagreement with the Landlord's assertion that the offer to lease was fully binding upon waiver of conditions (the "Notice of Waiver"), and the communications between the parties made it clear that there was a mutual understanding that there was a binding contract.

After a period of many months involving informal communications between the parties in regards to whether the Tenant would actually take possession or sub-lease the Premises, the Lease fell through on August 19, 2016, when the Tenant's lawyers sent a letter to the Landlord giving notice that the Tenant did not intend to execute the lease or take possession of the Premises. The Tenant never moved in.

The proposed lease terms disclosed in the Offer to Lease stipulated an intended ten year term. There was a budget for $100,000 included in the Offer to Lease in order to modify the Premises to suit the needs of the Tenant. That money was never paid out as the Tenant never moved in.

The Premises was located within a large shopping mall in Calgary, Alberta, where at any given time, there are small pockets of vacant space. The Landlord shuffled tenants in the mall around, and placed some short-term tenants in the physical space that was to have been occupied by the Tenant.

Issues

1. Is the Offer to Lease non-binding for want of certainty?
2. Can damages on these facts be calculated on a summary basis?

Held

1. Is the Offer to Lease non-binding for want of certainty?

The Court held that the facts in this Action are similar to the claim described in *Highway Properties Limited v Kelly, Douglas & Co*, [1971] SCR 562 ["*Highway Properties*"] where the Landlord asserts that the offer to lease was a binding contract, the intended Tenant repudiated the contract, and the Landlord accepts the repudiation and sues for damages.

The Tenant argued that the offer to lease was unclear as there were two different clauses defining the term "Commencement Date", and both of the definitions provide alternative dates that could become the Commencement Date. One of the provisions also contained an additional date outside of the date that was a year after the anticipated expiry date of the 120-day fixturing period.

The Landlord asserted the commencement date ought to have been June 1, 2017 and the agreement specifically said the Possession Date was anticipated to be February 1, 2017. After the 120-day fixturing period, the Commencement Date would be June 1, 2017.

According to the Master in Chambers, the facts supported the Landlord's view that the aforementioned periods relating to potential commencement and possession were realistic. The Court found that the Landlord had taken steps to obtain vacant possession in sufficient time, and took specific steps in the context of mitigation after the Offer to Lease fell through.

The Tenant argued that the provisions of the Offer to Lease, when examined closely, were not sufficiently clear so as to understand when the lease term was to begin.

The Court reviewed relevant terms and language in the Offer to Lease, including the following terms:

> "The words under scrutiny are contained in paragraphs 5, 7, and 11 of the July 28, 2015 letter agreement. Paragraph 5 [of the Offer to Lease] said this:
> Term:
> 10 years, commencing on the date (the "Commencement Date") which is the earlier of (a) the date the Tenant opens for business in any part of the premises, (b) the day following the expiry of the Fixturing Period (as defined in Paragraph 10 below), and (c) June 1, 2018, and expiring ten (10) years after the Commencement Date (unless the Commencement Date is not the first day of a month, in which case the Term shall expire 10 years after the last day of the month in which the Commencement Date occurs).
> Paragraph 11 said this:
> Commencement Date of Premises:
> The Commencement Date of the Lease will be and the Tenant will begin paying Minimum Rent, Additional Rent and Taxes on the date that is the earlier of:
>
> > opening for business in any part of the Premises; or the day immediately following the expiration of the Fixturing Period" (at paragraphs 41-43).

According to the Court, the Alberta Court of Appeal set out the proper approach to summary dispositions, including Summary Judgment in *Weir-Jones technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 ["*Weir-Jones*"].

On the issue of Summary Judgment in respect of the mitigation issue, the Chambers judge found that witnesses were necessary in order to properly understand certain decisions made by the parties and to determine whether the decisions of the Landlord were reasonable. Further, the Court found that a trial judge would be in the best position to make certain findings with respect to mitigation.

In the context of the contract, the Court found it was clear the parties had a binding agreement. The email and the Notice of Waiver specifically said the Offer to Lease was fully binding on the parties. A representative of the Tenant, at the time of reviewing the Offer to Lease, did not object or express concern with the notion of the Lease being fully binding at that point in time. A few weeks after receiving the offer to lease, the Tenant became apprehensive of moving forward and attempted to sublease the Premises.

On the issue of certainty, the Tenant relied on *Mitchell v Mortgage Co of Canada*, (1919) 59 SCR 90 ["*Mitchell*"]. In that decision, the landlord and intended tenant agreed that for $100 per month and the landlord signed a receipt for $50.00 with the following language:

> Received from Mr. John D. Mitchell the sum of Fifty Dollars, being a deposit on rental of St. Regis ground floor, building taken at $100.00 per mos.

The Court determined that on these facts, the Offer to Lease suffered from no uncertainty and was clear. The Court relied on several cases for ascertaining the certainty of the Offer to Lease including: *Canada Square Corp v Versafood Services Ltd*, and *1404761 Alberta Ltd v Compro Developments Ltd*, 2010 ABQB 156.

2. Calculation of Damages

There were arguments between the parties regarding the mechanisms for the initial calculation of loss, before deducting for mitigation efforts. As the Tenant never moved in, the Landlord did not have to spend money on renovating the premises. The Court found the budget for doing so was $100,000 and the Tenant argued that amount must be deducted.

The Landlord was required under the Offer to Lease to pay the Tenant an improvement allowance of $202,545.00 in staged amounts but to be paid in full within a few months of the Commencement Date as defined by the Lease. The Court found the Lease was intended to have a 10-year term and the Landlord suggested that one proper way to approach the Tenant improvement allowance was to amortize is over 10 years, and that another way is to ignore it because further time will lapse and further mitigation may result. By this logic, if the space went to another tenant, and an improvement allowance was payable to that tenant, the numbers can be reconciled. The Tenant also argued that there was a 120 day fixturing period, during which the Landlord would receive no rent had the agreement gone through. However, because the Tenant did not move in, the Landlord was able to continue collecting rent from other tenants. As such, the Tenant argued those amounts should be deducted.

The Tenant referred the Court to *491506 BC Ltd v McElmoyle*, 2004 BCSC 1075, 2004 Careswell BC 1837 for the proposition that moving an existing tenant to other premises within the building when it was necessary to do so is not a valid step in mitigation of damages. The Tenant argued that it was open to the Landlord to leave everyone where they were.

The Master in Chambers found that although a landlord must take all reasonable steps to mitigate its claims, as per *Highway Properties* and *LA Furniture & Appliances Ltd*, citing *Keneric Tractor*, [1987] 2 SCR 440 [*Keneric Tractor*], the Court pointed out that the burden of showing it failed to

take reasonable steps to mitigate lies with the Tenant, based on the decision of the Alberta Court of Appeal in Tangye v Calmonton Investments Ltd*, 1988 ABCA 206, citing Red Deer College v Michaels,* [1976] 2 SCR 325 and *Keneric Tractor*.

The Master in Chambers found that the Tenant filed no evidence in response, other than a transcript of the cross examination of the Landlord. The Tenant argued that there were inconsistencies in that witness' evidence, and the Master in Chambers found on that basis alone, there were triable issues with respect to mitigation.

Conclusion:

The Court allowed Summary Judgment in part, as the Master in Chambers concluded there was enough information on the record to conclude the Offer to Lease was a valid and binding contract. However, the Court did not allow Summary Judgment with respect to the determination of damages, as the Master in Chambers ruled there were triable issues that needed the benefit of a full trial for proper determination.

1533794 Alberta Ltd v Sintana Energy Inc (Mobius Resources Inc), 2019 ABQB 647

Facts

The plaintiff, 1533794 Alberta Ltd. was a (the "Landlord"). The Landlord's tenant was Subco (the "Tenant"), and the Tenant's parent corporation was Parentco ("Parentco"). Subco agreed to lease commercial office space at a premises controlled by the Landlord (the "Premises").

In April 2012, the Tenant (which at the time was Zodiac Exploration Corp.) signed a lease with the Landlord for use of the Premises (the "Lease"). The Tenant, through amalgamation, became Mobius Resources Corp. Parentco was at the time named Zodiac Exploration Inc., and later changed its name to Mobius Resources Inc., and then changed its name to Sintana Energy Inc ("Sintana").

Shortly after the Lease expired, an agent of both the Tenant and Parentco provided the Landlord with a document entitled 'Tenant Contract Information' providing contact information for the Tenant under the Lease. That form incorrectly described Zodiac Exploration Inc. as the legal name of the Tenant, when in fact that was the name of Parentco.

The Lease was never amended or replaced and Lease payments were never made by Parentco. Parentco never signed any documentation agreeing to be a Tenant, or assuming responsibility for the Tenant's obligations.

On July 18, 2013, the Tenant subleased a portion of the Premises to a company operating as PROACT Charted Accountants (the "2013 Sublease") with the Landlord's consent. Parentco was not a party to the 2013 Sublease. In July, 2014 (the "July 2014 Sublease"), the Tenant sublet a portion of the Premises to a different unrelated company, with the Landlord's consent. Again, Parentco was not a party to the 2014 Sublease.

Throughout this time, the Tenant's agent continued to provide Tenant contact forms to the Landlord, which incorrectly named Zodiac Exploration Inc., Mobius Resources Inc or Sintana (all names for Parentco) as the Tenant.

On the evidence, and submissions of counsel, there was no suggestion that the Landlord had been misled into thinking another corporation took over the lease. Further, the Court found it was clear from the record that it was only after litigation commenced that the Landlord even realized there were two corporations involved, instead of one.

The Landlord sued the Tenant for unpaid rent and damages for breach of Lease, Parentco brought the application for summary dismissal of the claim against it, on the basis Subco, the original Tenant, was liable. The Landlord filed an originating application in February 2016, seeking an Order terminating the tenancy, unpaid rent and damages for breach of the lease. Sintana, was listed as a respondent. The Affidavit in support of the Application demonstrated 153 mistakenly believed that Subco, the original tenant, had changed its name to Sintana, when Sintana was actually the name of Parentco. Parentco brought a cross application asking for the Landlord's original

Application to be converted into a Statement of Claim on the basis of substantial factual disputes to be resolved with respect to Parentco's liability.

After several months and cross examination on the Affidavit of the Landlord's deponent, the Landlord filed a new Originating Application for termination of lease, rental arrears and damages. However, the deponent again erroneously presented inaccurate information with respect to the identity of the Tenant. This time, the deponent stated Sintana was the new name for the Tenant, when Sintana was Parentco.

After a Consent Order converting the Originating Application into a Statement of Claim, a Statement of Defence was filed asserting that only Subco was the Tenant. Parentco pled there was no basis for piercing the corporate veil and imputing liability on Parentco. Parentco then filed an Affidavit that demarcated the corporate bodies and Parentco.

Issue(s)

1. Has Parentco met the burden of proof for summary dismissal?

Held

1. Has Parentco met the burden of proof for summary dismissal?

One of the Landlord's principle allegations pled that Zodiac Exploration Corp. (the Tenant) also carried on business under the name Zodiac Exploration Inc. (Parentco). The presiding Master in Chambers found no evidence that Subco carried on business and used Parentco as its trade name when dealing with the public.

The evidence established that the Landlord had received numerous Tenant contact sheets, giving Parentco as the name of the Tenant. However, the Court held that the evidence also established the Landlord believed it was still dealing with the Tenant, just under a new name. The Landlord never knew that it was now dealing with a separate corporate entity.

The Court discussed the topic of piercing the corporate veil between two corporations and specifically referenced in *Tirecraft Group Inc (Receiver of) v High Park Holdings ULC*, 2010 ABQB 653 ["Tirecraft"] where the Court stated:

> When will a court find the corporation to be a 'sham, cloak or alter ego' and pierce the corporate veil? Courts have found the following factors to be significant:
>
> - the shareholder treats itself and the corporation interchangeably, *Yang v Overseas Investments* (1986) Ltd (1995), 26 Alta. L.R. (3d) 223 (Alta. Q.B.);
> - the corporation is merely created to deflect monies from their proper usage, *Shillingford v Dahlbridge Group Inc* (1996) [*Shillingford*], 197 A.R. 56 (Alta. Q.B.) at para. 27;
> - the shareholder intermingles the corporation's affairs with its own, such that the shareholder fails to recognize the corporation's separate identity, *Pelliccione v John*

F. Hughes Contracting & Development Co. (2005), 47 CLR (3d) 104 (Ont. S.C.J.) at para. 104 [*Pelliccione*];

- the shareholder treats corporate property as though it belongs to the shareholders without regard for the interests of those dealing with the corporation, K.P. McGuiness, the Law and Practice of Canadian Business Corporations (Toronto: Butterworths, 1999 (as reproduced in *Pelliccione* at para. 97.

The Court looked to other cases where courts have assessed factors that might be significant for ascertaining whether a corporation was merely the agent or alter ego of its shareholder. The Court identified three notable factors:

- Whether the corporation was independent of its shareholders, Shillingford at para. 28;
- Whether the corporation has its own assets, skills or employees, Shillingford at para. 28; and
- Whether the corporation has its own bank account, books or records, Frankel at para. 10.

The Court drew out other examples where it may consider piercing the corporate veil in other circumstances, such as when persons hold themselves out to the public in one way, but fail to disclose their corporate identity. However, the Court said that situation did not materialize in this context.

The Court took issue with the fact the Landlord's Statement of Claim did not expressly allege that the businesses of Subco and Parentco were intermingled to such an extent it was appropriate to pierce the corporate veil.

On a review of the evidence, the Court arrived at two conclusions:

1. The Landlord never asserted in its pleadings that the businesses of Subco and Parentco were sufficiently intermingled to pierce the corporate veil; and
2. Even if the Landlord's pleadings did seek to pierce the corporate veil, the evidence does not satisfy piercing the corporate veil as set out in *Tirecraft*.

Last, the Court indicated there was no indication that further evidence would help better adjudicate the dispute. As such, Parentco satisfied the burden of proof to show there was no merit to the claim against it.

Conclusion

The Claim of 153 against Parentco was summarily dismissed, and the parties were left to agree on costs, or appear in 60 days.

Chew Fidelity Ltd v Greater Victoria Contracting Services Ltd, 2019 BCSC 1474

Facts

This Action involved the petitioner, Chew Fidelity Ltd, doing business as DNL Holdings was the landlord (the "Landlord") and the respondents, Greater Victoria Contracting Services, doing business as the Greater Victoria Society was the tenant (the "Tenant"), along with the individual respondent, Darian Gondor ("Mr. Gondor"), who was the principal of the Tenant. The Tenant was leasing a piece of land and commercial property in Victoria, British Columbia (the "Premises"). The Landlord's agent, Desmond Chew ("Mr. Chew") negotiated the lease (the "Lease") on behalf of the Landlord.

The Landlord sought a declaration that the Tenant was wrongfully in possession of a portion of land the Premises. The Landlord's main position was that the Lease commenced on February 1, 2018, and terminated on July 31, 2018, and that the leased area was for 3,000 square feet. In the alternative, the Landlord argued the respondent breached its lease. The Landlord filed for a Writ of Possession pursuant to the *Commercial Tenancy Act*, RSBC 1996 c. 57 (the "*CTA*").

The Tenant opposed the relief sought on the basis of there being a five-year and one month lease, for 10,000 square feet of rentable area. The Tenant submitted there had been no breach of the five year lease, but, in the event of a breach being established, sought relief from forfeiture.

Mr. Chew acknowledged that Mr. Gondor contracted with him in January 2018 about leasing a portion of the Premises for the Tenant's excavating and landscaping business. Prior to signing a lease, the Tenant moved some equipment onto the Premises and improved the Premises by preparing the ground and laying gravel. Under both versions of the Lease, the Premises were accepted by the Tenant on an as is basis, with the cost of improvement to be borne solely by the Tenant.

A version of the Lease was drafted on February 16, 2018, with a six month term and there was some back and forth correspondence between counsel, the parties, and their agents in respect of the details. At one point counsel advised the Landlord not to incorporate a vague express intent to renew clause, instead, the Landlord was advised to just tell the Tenant verbally of the need to meet before the end of the term to determine whether the Tenant was willing to renew.

An email was sent by the Landlord to the Tenant with a draft lease that specifically stated the lease was for 3,000 square feet for six months without a renewal clause. The Tenant, through Mr. Gondor, said it would send questions the next day. Later in March 2018 the Tenant tried to confirm that a renewal clause was being added to the lease and he sought confirmation of permission to improve the Premises.

There was subsequent communication between the parties and contemplation of the lease term. At one point, the Landlord suggested an April 11, 2018 meeting after the Mr. Gondor sent an email indicating he wanted to sign a six month lease. Later, the Tenant argued that he signed a lease with a five year plus one month term for 10,000 square feet of leasable space and denied signing the lease put to the Court by the Landlord.

As time went on, after the parties were operating in a Landlord-Tenant relationship, the Landlord became concerned about the Tenant's disposal practices, specifically after a fire occurred in a garbage bin. After investigation the Landlord concluded that the Tenant was no longer suitable for the Premises, and informed the Tenant the Lease would not be renewed. The Landlord concluded the Tenant was improperly using the Premises by bringing disposal bins filled with waste, including flammable and hazardous waste, which was contrary to the Lease.

At the end of July, 2018, the Landlord demanded the Tenant vacate the Premises within one month, and delivered a notice of termination to the Tenant and Mr. Gondor.

Issues

1. Did the parties enter into a six month or five-year lease?
2. If the six-month lease applies, is the Tenant wrongfully in possession of the Premises and is the Landlord entitled to a Writ of Possession?
3. If the five-year lease applies, has the Tenant contravened the Lease?
4. If the Tenant has contravened the lease, is it entitled to relief from forfeiture?

Held

1. Did the parties enter into a six month or five-year lease?

The Landlord brought its application for relief pursuant to sections 18 to 21 of the *CTA* for a Writ of Possession based on the position that it entered into a six-month lease with the Tenant that expired on July 31, 2018.

According to section 18(1) of the *CTA*:

> In case a tenant, after the lease or right of occupation, whether created in writing or verbally, has expired, or been determined, either by the landlord or by the tenant, by a notice to quit or notice under the lease or agreement, or has been determined by any other act whereby a tenancy or right of occupancy may be determined or put an end to, wrongfully refuses, on written demand, to go out of possession of the leased land, or the land that the tenant has been permitted to occupy, the landlord may apply to the Supreme Court
> (a) setting out in an affidavit the terms of the lease or right of occupation, if verbal;
> (b) annexing a copy of the instrument creating or containing the lease or right of occupation, if in writing;
> (c) if a copy cannot be annexed by reason of it being mislaid, lost or destroyed, or of being in possession of the tenant, or from any other cause, then annexing a statement setting forth the terms of the lease or occupation, and the reason why a copy cannot be annexed;
> (d) annexing a copy of the demand made for delivering possession, stating the refusal of the tenant to go out of possession, and the reasons given for the refusal, if any; and
> (e) any explanation in regard to the refusal.

Section 21(3) of the *CTA* provides:

> If after hearing and examination it appears to the court that the case is clearly one coming under the true intent and meaning of, and that the tenant wrongfully holds against the right of the landlord, then it shall order the issue of the writ under subsection (1) which may be in the words or to the effect of the form in the Schedule; otherwise it shall dismiss the case, and the proceedings shall form part of the records of the Supreme Court.

The Tenant sought relief from forfeiture pursuant to section 24 of the *Law and Equity Act*, RSBC 1996, c 253 which provides:

> The court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit.

In its decision, the Court based much of its decision on this issue on the credibility of the parties. With respect to credibility, the Court considered the decision of *Bradshaw v Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, which provided a framework for assessing credibility based on an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of the witness against the accuracy of the testimony the witness provided.

With respect to the Lease, each party presented a different signed version to the Court. In brief, the Court refused to accept the Tenant's version of events and lease finding there was a significant credibility problem for the Tenant and that the facts of the back and forth negotiation did not align with the Tenant's testimony. The Court found the Tenant never drafted a version of the lease containing a five year plus a one month term, or for a leased area of 10,000 square feet.

The Court found that the Landlord was guided by the legal advice he received and the Court accepted the Landlord's evidence regarding the negotiations and the papers brought to the signing meeting. According to the Court, the Tenant offered no plausible explanation for why it would be offered a five year lease for 10,000 square feet at the same price as a six month lease for 3,000 square feet, especially in light of legal advice that the form of the lease was not suitable for long term tenancy. The Court found the six month Lease contained all of the essential elements of a Lease as set out in the decision *Scott v PDF Training Inc*, 2004 BCSC 1646, and that the Tenant had reviewed the terms of the Lease.

2. *If the six month lease applies, is the Tenant wrongfully in possession of the Premises and is the Landlord entitled to a Writ of Possession?*

The Court found that a notice of termination was sent on August 29, 2018 to the Tenant and Mr. Gondor effective October 1, 2018. The Court found the Landlord provided one month's notice as required by the overholding clause and that the Landlord provided the Tenant with a notice to quit and vacate the premises on October 3, 2018.

The Court concluded the Tenant had no right to continued possession and that the Tenant had been in wrongful possession of the Premises since October 1, 2018.

Sections 18 to 21 of the *CTA* permits a landlord to apply for, and for the court to issue, an order to regain possession. Having found the Lease was expired, and the demand for possession made, the Court issued the Writ of Possession pursuant to section 21(1) of the *CTA*.

The Landlord also sought an award of special costs arising from the Tenant's conduct in presenting and relying on a five year lease, which the Court determined was a forgery. The Court looked to the decision *Hu v Dickson*, 2015 BCSC 218 ["*Hu*"] for discussion of the principles applicable to an award of special costs. From the decision in *Hu*, the Court stated that the kinds of conduct that warrant an award of special costs include the following:

> • acting with an improper motive, such as to intimidate, exhaust or financially drain the other party in the hopes that they will give up or soften their position in the litigation;
> • dissipating and/or not disclosing assets;
> • abusing the court's process by, among other things, failing to disclose documents, delaying in disclosing documents, failing to respond to reasonable requests, causing unnecessary interlocutory applications, and breaching the *Rules of Court* in a manner that prejudices the other party;
> • misleading the court, through outright fabrications or through evasive and/or equivocal responses; and
> • disobeying a court order.

The Tenant relied on *0923063 B.C. Ltd. v. JM Food Services Ltd.*, 2019 BCSC 553 at paras. 109-110, citing *P & T Shopping Centre Holdings Ltd. v. Cineplex Odeon Corp.*, 1995 CanLII 448 (BC CA), [1995] B.C.J. No. 330 (C.A.) as cases where the British Columbia Courts have held that where a contractual provision obliges a defaulting party to pay specific costs, the plaintiff may elect to pursue its right to contractual costs or elect to abandon its contractual right and seek ordinary costs in accordance with the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. The plaintiff cannot choose both forms of costs as it would result in double recovery: *P & T Shopping* at paras. 11, 19-24; *Trenchard v. Westsea Construction Ltd.*, 2017 BCCA 352 at paras. 8-10; *AMT Finance Inc. v. Gonabady*, 2010 BCSC 278 at paras. 101-107.

In this case, the Landlord elected to exercise its right to contractual costs. Having concluded that special costs were not appropriate in this case, the Court found that the Landlord was entitled to make that election for contractual costs under the lease.

Conclusion

The Landlord was given its Writ of Possession pursuant to the relevant provisions in the *CTA*, and the Tenant had to vacate the Premises. The Court found no basis for the Tenant's continued occupancy of the Premises because there was a six month lease that had expired.

Price Security Holdings Inc v Klompas & Rothwell, 2018 BCSC 129

Facts:

Fort Quadra Holdings Ltd. ("**Fort Quadra**") owned a property (the "**Property**") on which a commercial building was built (the "**Building**"). The Tenant had occupied office space in the Building since 1985. On July 29, 2002, K & R executed a lease agreement (the "**2002 Lease**") with Fort Quadra for a term of five years and four months, commencing on September 1, 2002 and ending on December 31, 2007 for office space (the "**Premises**"). Rent was to be paid on a monthly basis and was set at a fixed rate for each year of the Lease.

The Lease also contained an overholding clause which stated:

> "That if that Tenant shall continue to occupy the Leased Premises after the expiration of this Lease without any further written agreement and without objection by the Landlord, the Tenant shall be a monthly tenant at a monthly base rent equal to 150% of the monthly installment of Annual Base Rent payable by the Tenant as set forth in Article 4 during the last month of the Term and (except as to length of tenancy) on and subject to the provisions and conditions herein set out." (at para 9)

The Lease also contained an option to renew the Lease for five years, as long as the Tenant gave six months of notice prior to the expiry of the initial term.

In 2006, Fort Quadra was acquired by an entity connected to the Landlord. In June 2007, six months before the expiry of the 2002 Lease, an employee of Price's Alarms Systems Ltd. provided the Tenant with an extension agreement pursuant to its original terms. The Tenant refused, but stated that it would consider a new agreement at market rates and no longer needed some of the space it had been leasing. The Tenant sent the extension agreement back unsigned. The Lease expired without any extension agreement, after which the Tenant continued to occupy the Premises and pay the rent rate previously in effect.

The Tenant was approached by the Landlord three more times, in April 2008, October 2008, and late summer of 2012. Each time, the Landlord's offer to sign an extension agreement or enter into a new lease was declined by the Tenant for the same reasons as before. Throughout this time, the Tenant continued to occupy the Premises and pay the rent in effect under the 2002 Lease.

On December 31, 2009, Fort Quadra and the Landlord signed a declaration which listed Fort Quadra as "Bare Trustee" and the Landlord as "Beneficial Owner" of the Property (the "**2009 Declaration**").

In July 2014, the Tenant stopped paying rent and complained of certain management fees and charge-backs.

On July 15, 2016, the Landlord sold the Property. On July 21, 2016, the Landlord emailed the Tenant to inform it that additional arrears were owed pursuant to the 150% overholding rent provision in the 2002 Lease.

The Landlord commenced proceedings for outstanding rent arrears and applied for judgment by summary trial. The Landlord and Fort Quadra all disclaimed interest in the amounts alleged to be owed by the Tenant.

Issues:

1) What governed the relationship between K & R and Fort Quadra after December 31, 2007?
2) Does the Landlord have standing to bring this claim?
3) If yes, is overholding rent owed to the Landlord?
4) If yes, are rent arrears owed to the Landlord?
5) Is the claim statute barred?
6) What is the appropriate interest and costs?

Held:

1) *What governed the relationship between K & R and Fort Quadra after December 31, 2007?*

After the expiry of the 2002 Lease on December 31, 2007, the Tenant did not give notice to exercise its option to renew but continued to occupy the Premises and pay rent until July 2014, despite declining to sign any agreements multiple times because it wanted to pay less.

Following *Aim Health Group Inc. v. 40 Finchgate Ltd. Partnership*, 2012 ONCA 795 (Ont. C.A.) at para. 95 and *Orion Interiors Inc. v. State Farm Fire and Casualty Co*., 2015 ONSC 248 (Ont. S.C.J.), the Court ruled that the relationship between the Tenant and the Landlord was subject to a new tenancy agreement on a month-to-month basis with the same terms as the 2002 Lease (the "**2008 Lease**"). The Court came to this conclusion after considering that the Tenant continued to occupy the Premises after the 2002 Lease expired, the Landlord did not object to the Tenant's occupation and continued to collect rent, and the parties did not agree to any other arrangements.

2) *Does the Landlord have standing to bring this claim?*

The Tenant submitted that the Landlord was a stranger to the 2002 Lease and therefore the doctrine of privity precluded the Landlord from bringing a claim for rent arrears. The Court considered the timeline of events to deduce the relationship between the parties. Particularly, on December 31, 2009, the Landlord was declared "beneficial owner" of the Property after it acquired Fort Quadra.

Citing *Greenwood Shopping Plaza Ltd. v. Neil J. Buchanan Ltd.*, [1980] 2 S.C.R. 228 (S.C.C.) ("***Greenwood***") at 236, the Court stated that the doctrine of contractual privity bars anyone but the parties to a contract to be bound to it or entitled to its benefits. However, the Landlord submitted that there were three exceptions to the doctrine of privity according to *Greenwood* and *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd*., [1999] 3 S.C.R. 108 (S.C.C.):

- Agency exception: one of the parties to the contract entered into it as an agent of the third party;

- Trust exception: one of the parties to the contract entered into it as the third party's trustee; and
- Principled exception: the parties entered into the contract intending to extend the benefit in question to a third party seeking to rely on the contractual provision, and activities were performed by the third party which were contemplated as coming within the scope of the contract.

The Court rejected all of the principled exceptions in this case. The Court determined that the 2002 Lease was contracted before the Landlord was incorporated, and there was no authority to support that the agency exception applied to a contract formed before the contracting party became an agent or trustee of the principal. Therefore, neither the agency exception nor the trust exception applied. Further, based on the timings of the 2008 Lease, the incorporation of the Plaintiff, and the 2009 Declaration, the Court was not satisfied that the Tenant intended to extend the benefit of the 2008 Lease to the Landlord.

The Court then considered whether the Landlord still had a beneficial interest in the Property. The Court determined that the Landlord did not intend to transfer its entire beneficial interest in the Property to the purchaser after reviewing the 2016 Purchase and Sale Agreement as a whole, and taking into account its purpose and the nature of the relationship created by it. The 2016 Purchase and Sale Agreement was clear that the purchaser was entitled to income relating to the Property from and including the closing date, but not before. Further, the 2016 Purchase and Sale Agreement noted that the Landlord "shall not be credited with arrears of rent and other charges owed by the Tenant" but would be able to sue for the recovery of rent arrears. The Court stated that this language indicated that the Landlord did not intend to transfer its right to arrears owed in the Property. The Court rejected language in the 2016 Direction to Trustee, which stated that Fort Quadra would transfer its "entire beneficial ownership interests of [the Landlord] in and to the Property," because it was directly inconsistent with the 2016 Purchase and Sale Agreement, and it was more accurately characterized as a grant or assignment of an equitable interest instead of a contract.

3) *If yes, is overholding rent owed to the Landlord?*

The Tenant submitted that the Landlord was estopped by conduct from enforcing the 150% rent obligation in the overholding tenant provision, citing *Beavis v. Beavis*, 2014 BCSC 590 (B.C. S.C.) at para. 45. The Court considered that the Landlord continued to collect rent from the Tenant at the previously charged rate for more than six years. There was no evidence that the Landlord ever requested additional payments for overholding rent until July 21, 2016. The Court deemed that it was reasonable for the Tenant to infer that this practice was sufficient to satisfy its rent obligations, and that it provided utility for both parties.

As a result, the Court determined that the Landlord's representations were made with the intention to be acted upon by the Tenant and that it induced the Tenant to believe that the rent obligations had been satisfied during the overholding period. Further, the Court noted that, based on the Tenant's evidence, if the Tenant had known that it was going to be charged 150% rent for overholding, it would not have stayed on the Premises or would have demanded a new lease at a market rate.

4) *If yes, are rent arrears owed to the Landlord?*

The Tenant submitted that the rent rate under the 2002 Lease was significantly above market rate and in excess of what was required to finance leasehold improvements and renovations on the Premises, therefore it had overpaid the Landlord from January 1, 2008 to July 2014 and was entitled to an equitable set-off against any amount it may owe.

The Court rejected this argument as the relationship in 2008 to 2014 was governed by the 2008 Lease and there was no provision in the 2002 Lease which supported that the Landlord promised to lower the rent upon recouping improvement costs.

5) *Is the claim statute barred?*

The Court found that acknowledgement of liability occurred less than two years before the notice of civil claim was commenced and the claim was not statute barred.

6) *What is the appropriate interest and costs?*

The Landlord submitted that interest should be calculated at a rate pursuant to the terms of the 2002 Lease. Considering that the parties' relationship was governed by the 2008 Lease, which had adopted the terms of the 2002 Lease, the Court agreed with the Landlord.

Conclusion:

The Landlord's claim for enforcing 150% rent obligation for the Tenants overholding was estopped by the Landlord's conduct. However, the Landlord was entitled to rent arrears in amount of $144,094.29. Interest was calculated at prime plus 3% and the Court awarded solicitor-own client costs in favour of the Landlord pursuant to the 2002 Lease.

Hotchkiss v Budding Gardens Inc, 2020 ABQB 794

Facts

The landlord farmers rented a building on their property to a cannabis micro-growing facility. One year into a three-year lease, the landlord sought a declaration that the lease was unenforceable and sought eviction of the tenant. The first year's rent was fixed, and the second and third years' rent was to be negotiated based on a review of actual costs associated with upkeep of the premises. The landlord argued these provisions were uncertain, and further that the parties had failed to reach agreement on the new rent and so the uncertainty persisted. The tenant stated that an agreement had been reached on renewal but not papered.

In a letter of intent, the tenant advised the landlord of the intended use of the property and that the tenant could change the property as required under the then-evolving cannabis regulations. The landlord would pay for utilities, and had a right to inspect the property during business hours.

On re-negotiation, the landlord proposed a rental rate that was more than double the original rent, to reflect the fact that the utility costs to the landlord had been much higher than anticipated, and also to reflect a reserve for repairing or improving the infrastructure. The tenant disagreed and proposed a much lower amount. The landlord countered with an offer of a low monthly rent where the tenant would assume the cost of utilities as well as a broad assumption of risk of all potential loss to the premises. Negotiations broke down over several issues, including the landlord's right of access to the premises (which also contained facilities that served other parts of the landlord's property), which the tenant advised it needed to control under the applicable cannabis regulation, and also that the landlord was abusing its broad inspection right.

It should be noted that this was brought as an originating application, with each party requesting declarations as to the validity or uncertainty of the contract going forward.

Issues

1. Had the parties come to agreement on renewal?
2. Was the lease uncertain?
3. Did the parties come to an agreement on rent or access?
4. Did the landlord act in bad faith?
5. What remedy should be granted?

Held

1. Had the parties come to agreement on renewal?

Though the Court did not reproduce the content of much of the letters, it held that the letters offered as acceptance by the tenant did not meet the standards of an unqualified offer or acceptance, failed to address key points which were clearly in dispute at the time, and ignored material points on the landlords previous offer. Further, subsequent correspondence indicated

these letters were only part of a broader conversation that continued to be unresolved after. The Court found with little difficulty that no agreement had been reached on the terms of renewal.

A sub-issue here was whether the landlord had agreed by conduct. The landlord took certain steps that were contemplated in the renewal negotiations including decommissioning a water filtration system, invoicing and accepting rent for 2 months after the first year period ended, installing a separate electricity meter, invoicing for gas and utilities in accordance with a proposed formula, and obtaining insurance on the leased building. However, the Court held that this did not amount to acceptance. The terms had been in discussion for weeks, and some actions were provided as a courtesy. While a relationship between the parties remained, no agreement had been reached by the renewal date.

2. Was the lease uncertain?

Relying on and usefully summarizing *Ko v Hillview Homes Ltd*, 2012 ABCA 245, the Court made the following observations about contractual uncertainty, at para 64:

> (a) The test for interpretation and for certainty of terms is objective; one party's subjective views about the agreement, or how it would later work, not agreed to by the other side, are irrelevant (para 27).
>
> (b) The rule is far from a technicality (para 75, 80).
>
> (c) A supposed contract with an uncertain material term is not a contract, and not even an agreement, and is usually impossible to perform or enforce (para 81).
>
> (d) The essential terms must show with a reasonable degree of certainty what the parties meant (para 87, 101). Whether a term is essential depends on the type of the contract, for example, a contract to purchase a piece of machinery may require less specific details than a contract to build a house (para 91). If the parties considered they needed a term and included it in the agreement, but it is too vague, the contract will be void. This includes terms beyond identifying the parties, property or price (para 90).
>
> (e) It is irrelevant whether one party's attitude to negotiating an uncertain term was unfair or unreasonable (para 92).
>
> (f) Although a court may be reluctant to find a contract void for uncertainty which has been partly or fully performed at least by one side, there should be no general reluctance to find a contract void for uncertainty (para 118).
>
> (g) Whether the parties thought they had a contract is irrelevant, particularly where the contract is not performed (para 119).
>
> (h) Uncertainty of terms may be saved if:

a. A specific manner of ascertaining the term has been given by reference to a published or to be published price or set of standards.

b. A third party arbitrator or valuator, or even one of the parties acting unilaterally, has been authorized to fix the term.

c. An established custom of the trade is implied as having been incorporated into the contract, e.g., when and where sales might close or that debts will be paid.

d. A term is implied because it is

i) so obvious to the bystander;

ii) implied by law, e.g., the use of Canadian currency or concurrent tenders of conveyance and price (para 120).

(i) A party alleging an uncertain term need not complain immediately, as it is not improper to later raise invalidity arising from uncertainty (para 121).

(j) If no valid contract initially existed, the later conduct of the parties (short of a new contract) is irrelevant (para 121).

(k) A duty to negotiate seems incompatible with the adversarial nature of negotiation between parties dealing at arm's length (para 136).[6]

The Court went on to note the danger that lies in "agreements to agree" such as a provision to renegotiate at a later date, as they risk being altogether void. This rule is much more than a mere technicality and cannot be dispensed with. The issue is whether the prevailing rate can, within the contract and surrounding context, be determined with sufficient certainty by a court.

The Court distinguished *Mustard Seed (Calgary) Street Ministry Society v Century Services Inc*, 2009 ABQB 171 since, in that case, there was reference to a current market rental rate on which to anchor a calculation. The tenant argued that the reference in the present lease to utility costs was a similar anchor, but the Court disagreed. Any suggestion that this referred simply to basic utilities and excluded any consideration of capital cost allowance, insurance, etc. was unreasonable and would likely expose the landlord to an inevitable loss. It was therefore speculation to impose a court-approved rent calculation based on the language of the contract.

There was also the context of the parties relationship: neither was experienced in cannabis cultivation, and the tenant had not even received the necessary licenses when it commenced its operation. The presence of so much uncertainty may have made it reasonable for the parties to include vague "agree to agree" provisions in the lease, but it also precluded the Court from being able to impose its own view of a "reasonable" term to calculate a renewal rate. Simply put, there was too much the parties could not have possibly known or contemplated about the terms of a first-year renewal when they entered the lease.

3. Did the parties come to an agreement on rent or access?

The tenant argued that the landlord had agreed to all of the necessary terms of a contract by June 11, 2020 by indicating favourably certain rent terms. The landlord's position was that any agreement was subject to a formal lease addendum, and that rent was not a severable issue that could be agreed to on its own. In correspondence, the landlord twice reiterated that while it was favourable to some terms, it still contemplated signing a formal renewal addendum to finalize the deal. In the words of the Court, this was "not the language of a concluded agreement".
On the elements of contractual formation, the Court noted:

> [103] First, the fundamental elements of offer and acceptance were not met.
> [104] The landlord's terms were presented as a package. There was no offer or acknowledgment by the landlord to negotiate rent separately, after the parties embarked on negotiation of the low rent framework. It was abundantly clear, on an objective basis, to all concerned that the low rent framework would require substantive changes to the lease and involved compromises by the parties to arrive at an agreement.
> [105] Further, some essential elements were not agreed on: As of June 11, 2020, important issues of landlord's rights of inspection, emergency access for the landlord, and the terms on which the tenant would assume responsibility for maintenance and upkeep were left unresolved.
> [106] Paraphrasing the language from ***Bawitko*** quoted earlier, the original contract is incomplete because essential provisions intended to govern the contractual relationship had not been settled or agreed upon. The tenant is simply attempting to extract the parties' consensus on the amount of rent and convert it into a stand-alone agreement. It was not offered as a stand-alone agreement, and the landlord never changed that position.
> [107] Second, this is a case where, objectively speaking, each side operated on the basis that a formal amending document would be required.
> [108] The landlord made clear it required agreement on a formal lease addendum or restatement in order to assume legal obligations. The exchange of correspondence was so frequent, and the discussion so wide-ranging, that, objectively speaking, the parties must have contemplated wrapping the matter up with the execution of a formal agreement.

4. Did the landlord act in bad faith?

This matter was largely dropped by the tenant in its oral submissions but the Court still addressed 3 points: 1) the landlord's approach to negotiation issues other than utilities and upkeep was not inappropriate; 2) the landlord's position that the tenant pay all costs was not unreasonable; and 3) the landlord's position on access was reasonable.
The circumstances were that under the first year of the lease the landlord had a broad, open-ended, and unknown obligation to pay costs. Neither party had experience with cannabis operations, which had just become legal, and in the first year utility costs had vastly exceeded what was anticipated. Further uncertainty was expected as the operation was still not fully scaled up. The landlord had accepted this uncertainty for the first year, and the tenant refused to take it on going forward stating essentially that it was commercially unreasonable to accept such a risk. In short, it was a legitimate point of negotiation that had not been resolved.
The issue of access was largely unaddressed in the original lease, aside from the landlord only having access during business hours. However, since equipment that was crucial to the running

of the broader property was held on the leased premises, the landlord needed to be able to quickly access that equipment in case of emergencies, which could happen at any time. On the other side, the tenant had a quiet enjoyment clause, and the Court found the landlord had to act reasonably and minimize inconvenience to the tenant. In the circumstances, further negotiation could be reasonably expected.

5. What remedy should be granted?

Having held that the lease was uncertain in years two and three, the Court moved to consider the landlord's request that the lease "became void". However, no authority was cited that the first and second years of the lease could be severed from one another to find only the remaining two years void. In the circumstances, the Court went no further than to state that the last to years of the lease were uncertain and invited the parties to make further submissions as to relief if desired.

Conclusion

The Court declared that the last two years of the lease were uncertain as necessary terms could not be determined within the confines of the contract.

Westcorp Properties Inc. v Taouk, 2022 BCSC 1204

Facts:

This matter is an action for damages for a breach of either a lease or an "offer to lease" (as discussed below) between the Landlord, and Dalal Taouk, Jessy Taouk and Mohammed Anabtawi (the "**Tenants**"). In broad terms, the Tenants leased a premises in from the Landlord for the purpose of running a restaurant ("the **Restaurant**"). The Restaurant failed, and the Tenants abandoned the premises. The premises were then reconfigured and relet, but at a considerable loss and expense to the Landlord.

Issues:

Were the Tenant's bound by either the lease or the offer to lease?

Held:

The main issues in this case centered around the identity of the Tenants. Dalal Taouk denied signing the lease, despite a signature existing next to her name on the lease document. However, Dalal did acknowledge signing the offer to lease that was accepted by the Landlord.

In April 2009, the Landlord and the Tenants met to discuss the Tenants leasing the premises to operate the Restaurant. During that meeting, Dalal talked extensively about her restaurant experience. Dalal later claimed she was only involved in those discussions to assist her daughter, and other family members to secure space for the Restaurant business.

During discovery, a representative for the Landlord testified that her impression was that Dalal was putting herself forward as the tenant, and that she was the sole focus of the Landlord's assessment. The Landlord noted several meetings occurring with the Tenants, and that Dalal always did more talking than the others, she tended to speak in the first person, with phrases like "I am going to…", and that it was clear she was the one with the experience managing restaurants. On that basis, the Landlord's real estate broker deposed that he formed the view that Dalal was *the* tenant. Following those meetings, the Tenants' real estate broker provided an offer to lease, in the names of Hadeel Anabtawi, the daughter of Dr. Mohammed Anabtawi, and Jessy Taouk.

On April 27, 2009, confusion between the parties arose when the Tenants returned a "condition waiver" form signed by Dr. Anabtawi and Hadeel. The Landlord's real estate broker responded with concern, noting it had been his misunderstanding that "Hadeel" was Dalal. When informed that Hadeel and Dalal were different people, the Landlord's real estate broker advised the Tenants that Dalal was required to be on the offer to lease. The Tenants' real estate broker then prepared an amendment to the offer to lease, removing Hadeel as tenant and adding Dalal, and the Tenants' real estate broker provided a signed copy by Dalal and Jessy as Tenants, and Dr. Anabtawi as indemnifier, dated April 24, 2009. Among other provisions, the offer to lease included the following provision:

> A Lease in the form not attached including the terms and conditions set out in this Offer to Lease shall be prepared by … the Lessor… . It is understood and agreed that the Lessor's Lease deals in greater detail with the provisions hereof and contains clauses in addition to those in the Offer to Lease. … This Offer to Lease, upon acceptance shall become a binding contract.

On May 1, 2009, the Tenants secured property insurance, which showed the name of the insured as "Kamal & Dalal Taouk o/a Aladdin Café". Subsequently, a formal lease was executed and returned by the Tenants, with signatures next to the names of Jessy and Dalal as tenants, and Dr. Anabtawi as indemnifier. Dalal maintained her signature on the lease was forged.

Despite the execution of the Lease, Dr. Anabtawi engaged the Landlord in the weeks following execution to request Dalal be removed from the Lease. The Landlord advised the Tenants it entered the lease with the Tenants specifically due to the strength of Dalal's restaurant experience and on that basis, she could not be removed. In early September 2009, Dalal further engaged the Landlord to have her removed from the lease. According to the Landlord's representative, after denying Dalal's request, apparently Dalal, while gesturing to a copy of the executed lease, stated "I've never signed that anyway".

The premises were abandoned by the Tenants in July 2010 without the Tenants providing notice to the Landlord. The property manager prepared a termination notice on July 22, 2010. The Landlord accordingly took back possession of the premises.

The Landlord claimed at trial that there is no issue that Dalal and Jessy are bound by the offer to lease since they both acknowledged signing the offer. With respect to the formal lease following the offer to lease, the Landlord claims Dalal either signed the lease, or assented to it by her conduct, or that she ratified or adopted the signature next to her name through her conduct. Further, the Landlord submitted if Dalal failed to sign the lease such failure is a breach of the offer to lease because the offer to lease obliged the Tenants to enter a lease.

The Court was not satisfied that Dalal signed the formal lease. The Court concluded Dalal's denial of her signature in the manner she denied it is consistent with many aspects of her behaviour. Specifically, her aggressive nature, misplaced confidence in her knowledge of restaurants and commercial leasing, her sloppy approach for business matters and her desire to use her knowledge to assist her family members. With respect to Dalal's sloppy business practices, the Court noted Dalal securing insurance for the Restaurant in the name of her and her husband Kamal, which the court assessed "on no one's version of events would this have been a proper naming of the insureds".

While the Landlord's raised examples of Dalal requesting she be removed from the leases, dealing with the property manager with respect to issues with the premises, and requesting the Tenants' real estate broker for assistance in selling the Restaurant and assigning the lease, the Court held these examples are all consistent with Dalal's behaviour of pushing herself to the forefront to assist family members and were also consistent with her ill-informed knowledge of commercial leases. The Court also noted Dalal had a tendency to "blur legal distinctions" when advancing collective family interests, the obvious example being her attribution of her own restaurant experience to her family members, which Dalal explained was her way of demonstrating the guidance available for

training others. In this regard, the Court found Dalal was likely playing "fast and loose", but the implication is that this creates substantial uncertainty over the question of whether she unambiguously assented to or ratified the formal lease. Ultimately, based on all the evidence before the Court, it found it was unable to conclude that Dalal's denial that she signed the formal lease was untrue. Instead, the Court found it was more likely that Dr. Anabtawi applied Dalal's purported signature to the lease.

The Court accepted that the unauthorized act of an agent, such as Dr. Anabtawi signing on Dalal's behalf, can be later ratified by the principal and binding upon them. However, in this case, the Court found it was unable to conclude that the actions of Dalal with respect to the formal lease constituted unambiguous acts of ratification of the signature next to her name on the formal lease.

With respect to the offer to lease, the Court was satisfied when executed, with the conditions removed, it formed a binding contract. In this case, the parties agreed on all the essential provisions necessary for a commercial tenancy agreement. On that basis, the Court was satisfied that the offer to lease was binding on Dalal. Jessy, however, was bound by the formal lease.

Since the offer to lease required the parties to execute a formal lease, Dalal breached that agreement by failing to execute the lease. In this regard, the Landlord claimed the measure of damages for Dalal's breach of the offer to lease is the same as it would be for a breach of the lease. According to the Court, this might have been the case if the offer to lease appended the form of lease as a schedule, so that all the terms were clear to the executing parties. However, that was not the case here. Accordingly, while Jessy was bound by the lease, Dalal was bound by the obligations set out in the offer to lease and she was not subject to the additional terms provided under the lease.

In this case, the Tenants abandoned the premises. According to the Court, abandonment is a repudiation of the lease and entitles a landlord to terminate the lease and claim damages for the balance of the rent payable, in addition to other damages caused by the repudiation. In this case, the Landlord gave notice to this effect.

With respect to damages, the Court was satisfied that damages ought to be awarded to the Landlord for repair and cleanup ($3,347.64) and the lost rent and lost additional rent ($185,718.74). The Court was not prepared to award damages of $150,859.3, for the reconfiguration of the premises and other costs related to reletting the premises. In the Courts opinion, many of the works performed were not costs for reletting the existing premises, these were costs of an extensive remodeling that resulted in *different* premises. On that basis, the Court was not satisfied that those costs were recoverable as damages against the Tenants. The Court further found damages for the cost of reletting the premises, and the cost of tenant improvement allowances, were not appropriate claims as those are expenses the Landlord would have likely incurred in any event had the Tenants not renewed the lease.

Conclusion:

In brief, the Court was not satisfied that: (1) Dalal signed the formal lease; (2) Dalal assented to the Lease; or (3) Dalal ratified the signature that was placed next to her name on the Lease. Jessy was bound by the lease, but only the offer to lease provisions were binding on Dalal.

Boniventure Properties Ltd. v Eng, 2021 BCSC 1716

Facts:

The applicant Boniventure Properties Ltd. (the "**Landlord**") entered a handwritten agreement with the Tenant the "**Handwritten Lease**"). Under the Handwritten Lease, the Tenant was required to pay rent of $900 per month plus a percentage of property tax and HST. The Handwritten Lease was for a three-year term, renewable for another three years with an unspecified rent increase. While a formal lease was prepared, the formal lease was never executed (the "**Typewritten Lease**"). After the initial three-year term expired, followed by the three-year renewal (collectively, the "**Six-Year Term**"), the Landlord advised rent would be increased to $1,350.60 per month, pending a market appraisal. The Tenant delivered 12 post-dated cheques in that amount. When the Landlord subsequently advised the Tenant the rent was to be increased to $1,628.35 per month, the parties failed to reach an agreement, and the Landlord gave notice of termination and then brought an application for a writ of possession, and declaration that the Tenant was overholding, in addition to an order requiring the Tenant to pay double rent for the overholding period.

Issues:

1. *Whether the Landlord is entitled to a writ of possession for the premises.*

2. *Whether the Tenant was an overholding tenant.*

3. *Whether the Landlord is entitled to payment of double rent for the overholding period.*

Held:

1. *Whether the Landlord is entitled to a writ of possession for the premises.*

1.

On March 21, 2018 the Six-Year Term under the Handwritten Lease expired. The Tenant continued to occupy the premises and pay rent for a period following this expiration. On June 1, 2018, however, the Landlord verbally advised the Tenant it would be adjusting the rent. The Landlord advised the Tenant in writing that the additional rent would be $1,350.60 per month. At this time the Landlord further advised the Tenant that rent would be subject to a further increase, in anticipation of an upcoming market appraisal.

In August 2018, the Landlord obtained the market appraisal for rent and delivered a notice to the Tenant that rent for the premises would be increased to $1,628.35, commencing October 2018. The parties attempted to negotiate further, however, the Landlord communicated by text message on at least two occasions that the Tenant would be required to pay the increased rent as of October 2018 or they would be required to vacate the premises. On September 28, 2018 the Landlord delivered a notice of termination to the Tenant, requiring they vacate the premises by October 31, 2018.

In this case, the Court found ordering a writ of possession in favour of the Landlord was appropriate, because the Tenant were wrongfully overholding against the rights of the Landlord. This finding was based on the Landlord providing clear notice to the Tenant in October of 2018

that the Tenant was required to either pay the increased rent amount or vacate the premises, and that on October 15, 2018 counsel for the Landlord notified the Tenant they had been overholding on a monthly basis. The Court noted it was undisputed that the Tenant refused to leave the premises and that they had only paid monthly rent of $1,356.60 since October 1, 2018.

2.

2. Whether the Tenant was an overholding tenant.

3.

Pursuant to the Handwritten Lease, the Court found the Tenant had no legal right to occupy the premises following the demand from the Landlord to vacate the premises. The Handwritten Lease expired on March 21, 2018, and the Tenant had no further option to renew. The Typewritten Lease was never signed by the parties. Accordingly, in the Court's view, the six-year term under the Handwritten Lease was the operative legal document at all material times.

Following review of the communications between the parties, the Court concluded the parties never agreed to the essential terms of a term extension or renewal, specifically the amount of rent and length of term were not agreed upon. To the contrary, the Court found the Landlord had made it clear to the Tenant they would be required to vacate the premises unless thy paid the increased rent, and that the Tenant never paid the increased rent despite repeated requests from the Landlord.

The Court ordered the writ of possession should be issued from the date of this decision, subject to seven days from the date of the order allowing the Tenant to vacate the premises. The Court ordered the Tenant to pay $7,499.25, plus interest, which constituted the difference between the rent paid by the Tenant and the market rent levied by the Landlord pursuant to the market valuation.

3. Whether the Landlord is entitled to payment of double rent for the overholding period.

With respect to payment of double rent by a tenant for overholding, section 15 of the CTA provides where a tenant overholds and stays in the premises after the expiry of the lease and after a demand to vacate, the Court may order double payment of yearly rent for the land so detained. However, on the circumstances of this case, the Court found it would be inappropriate to award double rent in favour of the Landlord.

The Court noted three requirements for a claim of double rent under the CTA:

1) that the lease be for a fixed term measured in years;

2) that the landlord has made a written demand for possession; and

3) that the tenant remains willfully in possession.

While the Court found the second factor was unquestionably met, it was not satisfied the Landlord had demonstrated the first and third factors. Based on the foregoing facts, the Court found that at the time the demand to vacate was made, the fixed term of the Handwritten Lease had already expired, on March 21, 2018, with the Landlord continuing to rent the premises to the Tenant on a month-to-month basis while the parties negotiated. The Court noted the parties took two months

to realize the Handwritten Lease had even expired, and at that point the Landlord chose to renegotiate a higher rent amount instead of moving to evict the Tenant.

With respect to being "willfully in possession" under the third factor, the Court held the word "willfully" has been interpreted restrictively, and under section 15 of the CTA, "willfully" would require the Tenant to overhold the premises voluntarily and intentionally, rather than overholding through mistake or negligence. Accordingly, the Court in this case found the Landlord had not clearly established that the Tenant was acting voluntarily and intentionally. The Court found that both parties shared in the responsibility for failing to finalize the Typewritten Lease, which resulted in significant ambiguity with respect to any renewals or rent increase to the Handwritten Lease. The Court found the Landlord further contributed to the ambiguity by failing to address the question of renewal immediately after the expiration of the Handwritten Lease on March 21, 2018, and allowing the Tenant to remain on a month to month basis, and through attempts to further negotiate. Accordingly, double rent was denied to the Landlord.

Chen v Xiao, 2019 BCSC 2036

Facts

The plaintiff and owner, Xufen Chen (the "Landlord"), leased the Property to the defendant tenant, Yafeng Xiao (the "Tenant") who ran a computer store out of a strata unit located within a shopping development known as Parker Place (the "Property"). Pursuant to an express agreement, the Landlord leased the Property to the Tenant. Two different versions of the Lease were put before the Court at trial and each party stood behind its own version. The Landlord's version of the Lease included a one year term, followed by a month to month tenancy (the "Original Lease"), while the Tenant's version of the lease included ten and nine year terms (the "Ten Year Lease").

Both of the documents indicated August 20, 2015 as the signing date, along with a commencement date of September 1, 2015. Both the Original Lease and the Ten Year Lease stipulated rent at a rate of $1,500.00 per month.

Shortly after the tenancy commenced, the strata council (the "Strata Council") began complaining to the Landlord about the use and occupation of the Property. Eventually, the Strata Council imposed fines on the Landlord for violations of the use restrictions that were imposed when the Lease was signed and for with violation of strata bylaws.

The Landlord sought to recover an amount equal to the fines from the Tenant, and requested an Order requiring the Tenant vacate the Property, along with damages assessed at double the value of the rent pursuant to section 15 of the *Commercial Tenancy Act*, RSBC 1996, c 57 (the "*CTA*").

The Tenant relied on the Ten Year Lease at trial and asked the Court to terminate that lease arguing that the Strata Council and the Landlord made it impossible to operate its business from the Property. Further, the Tenant counterclaimed seeking damages for loss of business and the cost of changing locks.

The Tenant continued to occupy the Property as of the date of the trial.

Issues

1. Which Lease Agreement did the parties sign?
2. If the parties signed the Original Lease, is it valid?
3. If the Original Lease is signed and valid, when does the term end?
4. What remedies are available?

Held

1. Which agreement did the parties sign?

At trial, the Court found the original lease was a two-page typed document. The second page included the following terms:

1. The terms of the Original Lease include:
1. "FIXED-TERM AGREEMENT (LEASE):
   Tenants agree to lease this premises for a fixed term of 1 years, beginning September 1, 2015 and ending August 31, 2016. Upon expiration, this Agreement shall become a month-to-month agreement AUTOMATICALLY, UNLESS Tenants notify the owner in writing at least 3 months prior to expiration that they do not wish this Agreement to continue on any basis.
2. RENT:
   Tenant agrees to pay Landlord as base rent the sum of $1500 per month, due and payable in advance on the 1st day of each month during the term of this agreement" (at paragraph 21).

The Court found that the Ten Year Lease was identical in form, and contained many of the same terms. However, in the Ten Year Lease, the term was covered from September 1, 2015 to August 31, 2024. Further, in the Ten Year Lease there was a clause stating the Landlord could not ask the Tenants to move out without consent.

The Court found term 7 of the Ten Year Lease contained the following language: "[l]andlord agrees to pay (i) 6 months of Tenants' sales revenue, (ii) moving cost, (iii) lawyers fee and (iv) all related legal cost" (at paragraph 23). The Court found the language in term 7 of the Ten Year Lease was totally different from the language in the same clause in the Original Lease.

The Court relied on the seminal decision *Faryna v Chorny*, [1952] 2 DLR 354 (BCCA) for indicia to assess the credibility of a witnesses. Specifically, the Court relied on the following proposition in respect of credibility:

> [t]he credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the person testifying carried conviction of the truth. Instead, the test must reasonably subject the evidence to an examination of its consistency weight against the probabilities that surround the facts of existing conditions… (at paragraph 69).

The Landlord argued that the Tenant was not credible and asked that an adverse inference be drawn from the Tenant's failure to call one of the Tenant's personal representatives, Mr. Pan ("Mr. Pan") as a witness. The Court determined that Mr. Pan had key evidence pertaining to the key factual disputes. There was confusion in the evidence with whether Mr. Pan was properly served with a subpoena, and the Court found the Tenant failed to provide a legitimate explanation for not calling Mr. Pan as a witness and from that, the Court expressly inferred that Mr. Pan's evidence would either be contrary to the Tenant's evidence, or at least not support the Tenant's evidence.

The Court did not accept the evidence of the Tenant, and found that "[t]he reality is there is simply no other explanation for the original handwriting and signatures in blue ink on the two pages of the Original Lease" (at paragraph 82).

As such, the Court found the parties signed the Original Lease, not the Ten Year Lease.

2. Is the Original Lease Valid?

The Court noted that the only question regarding the validity of the Original Lease related to the incorrect address. There was no dispute a lease has at least five essential requirements (See *Canada Square Corp. Ltd. v. Versafood Services Ltd.* (1981), 1981 CanLII 1893 (ON CA), 130 D.L.R. (3d) 205 at 214 (Ont CA)):

2. 1. The identity of the Landlord and Tenant;
3. 2. The description of the property subject to the lease;
4. 3. The term of the lease;
5. 4. The date the term begins; and
6. 5. The rent payable during the term.

The Landlord argued that the Court can correct the error in the description of the Property with or without rectification, and the Court found it was clear the common intention of the parties was to enter an agreement regarding 1270- 4380 No. 3 Road. As recorded in the Original Lease and noted, the address reflected a mutual mistake; excepting the unit number which the Court accepted was corrected at the meeting.

The Court also determined that it could simply correct the description of the Property in the Original Lease. Alternatively, the Court granted the remedy for rectification to accomplish the same.

3. If the Original Lease is signed and valid, when does the term end?

The Court referenced *A Commercial Tenancy Handbook* in support of the proposition a lease can be for a specified time period with or without a right of renewal; or a periodic lease from month to month or year to year (at paragraph 91).

According to the Court, periodic tenancies can be terminated by notice from either party and the Court found the language in term 1 of the lease was clear and straightforward. The Court determined that when the one year term expired, a month to month tenancy began and that during the month to month tenancy, there was an obligation to terminate the Original Lease on notice to the Tenant in order to demand possession.

4. What Remedies are Available?

The Court made the following observation:

7. Section 15 derives from s. 1 of the English *Landlord and Tenant Act*, 1730 (U.K.), 4 Geo II, c. 28. The relevant portions read:
   In the case any tenant for any term of life, lives, or years … willfully holds over any land after the determination of any such term, and after demand made and notice in writing given for delivering the possession thereof by the landlord … in such case the person so holding over shall … pay to the person kept out of possession … at the rate of double the yearly value of the land so detained, for so

> long time as the same are detained, to be recovered in any court of competent jurisdiction (at paragraph 94).

According to the Court, the decision in *Sami's Restaurant Corp. v W. Hanley &* Co, 2003 BCSC 1181 confirmed that section 15 of the *CTA* is penal in nature and must be strictly construed. The Court found that there are three necessary requirements identified for a double rent claim:

1. A written demand for possession;
2. A tenancy for life, lives or years; and
3. A willful over holding by the Tenant

The Trial Judge found evidence the Landlord took no steps to actually terminate the lease during the one year term and that the first requirement of the above test was not met. Further, the Court found the tenancy at the time of termination was month to month which also fails the second requirement. Therefore, the Landlord's claim for damages pursuant to section 15 of the *CTA* failed.

Conclusion:

The Court awarded an amount equal to monthly rent of $1,500.00 starting September 1, 2016, paid until the end of the month the Tenant ceased occupancy of the Property. The Court found the Landlord failed to identify a legal basis for payment of the strata fines and dismissed the plea for that remedy.

The Trial Judge granted the request for a declaration of the Landlord's entitlement to possession of the Property, and ordered the Tenant vacate the Property.

The Court dismissed the Tenant's counterclaim on the basis the Tenant failed to identify or establish a cause of action for damages for loss of business. The Trial Judge allowed for the Tenant's small claims award for the cost of replacing the locks to be applied against the amounts owed.

Can-Faith Enterprises Inc v 0932784 BC, 2019 BCSC 1322

Facts

Pursuant to a lease dated February 23, 2012, between Basha Sales Co. Ltd., Leibel Sales Co. Ltd. and Newport Sales Co. Ltd. as the landlord (the "Landlord"), 093284 B.C. Ltd. Rio Brazilian Steakhouse as tenant (the "Tenant"), and Mario Ramos as indemnifier (the "Indemnifier") (collectively the "Defendants") premises with a total gross floor area of approximately 3,638 square feet at the Property (the "Premises") were leased for a five-year term commencing May 1, 2012 (the "Lease").

The parties primary disagreement concerned whether or not the Tenant exercised its option to renew the Lease. The Plaintiffs argued that the Defendants had done so while the Defendants took the position the renewal was conditional.

The dispute materialized between the parties in respect termination of a lease agreement. Of particular disagreement was whether an option to renew was exercised. The dispute concerned a piece of property owned by the plaintiff Can-Faith Enterprises Inc. (the "Owner") located in Vancouver, British Columbia. The co-plaintiff, Turner, Meakin Management Company Ltd. ("Turner") was the Landlord's property management agent, authorized to collect rent and handle all property management responsibilities for the Property.

The relevant portion of the renewal clause (the "Renewal Clause") (article 17.1) in the Lease reads as follows:

> (i) Notice by the Tenant to the Landlord 9 months before the expiry of the initial term of the Lease;
> (ii) The Tenant must not be in breach of any covenant or condition contained in the Lease; and
> (iii) The Tenant must have observed and performed its covenants and conditions contained in the Lease.

The Owner commenced arbitration proceedings to determine the Current Market Rate (the "CMR") for the renewal term by issuing a notice to arbitrate in May, 2017. The Tenant, and the indemnifier, through counsel, attended a pre-hearing conference at which time there was discussion about the arbitrator's jurisdiction to determine whether there had been a valid exercise of the renewal clause. The Arbitrator determined he had the jurisdiction to determine whether there had been a valid exercise of the option to renew as that determination was a pre-condition to deciding the CMR. The Arbitrator issued a final award in December, 2017 finding the Current Market Rate to be $26.50 per square foot or $96,407.00 per annum.

The Owner brought an application for summary trial pursuant to Rule 9-7 of the *BC Rules of Court* for judgment against the Defendants for the following:

- Rent arrears;
- Damages for breach of a lease agreement;
- Leave to apply for an assessment of further damages for loss of future rent;

- Payment by the defendants of their actual legal expenses; and
- Interest on all amounts owed at prime plus three percent.

The Court canvassed relevant parts of the Lease and the indemnity agreements. The Lease provided, in part, as follows:

> (a) the Tenant agreed and covenanted to pay Annual Base Rent in equal monthly instalments, in advance, on the first day of each and every month, in the amounts stipulated by the Lease (Articles 4.1(a) and 4.2(a));
>
> (b) the Tenant agreed to pay Rent on the days and times specified in the Lease without set-off, abatement, compensation or deduction whatsoever (Article 4.1);
>
> (c) if the Tenant shall fail to pay Rent promptly when due, the Landlord shall be entitled, if it shall demand it, to interest thereon at the rate of 3% per annum in excess of the Prime Rate…;
>
> if the Landlord re-enters or terminates the Lease by reason of the Tenant's default, then, without prejudice to the Landlord's other rights and remedies:
>
> (i) the provisions of the Lease which relate to the consequences of termination and the provisions of the Lease as they apply with respect to acts, events, omissions which occurred prior to the termination, shall all survive termination; and
>
> (ii) the Tenant shall pay to the Landlord on demand such reasonable expenses as the Landlord has incurred and a reasonable estimate of expenses the Landlord expects to incur in connection with the re-entry, termination, and collection of sums due and payable by the Tenant, including brokerage fees, legal fees and disbursements, the expenses of cleaning and repairing the Premises and preparing them for re-letting.

Issues

1. Is the claim suitable for a summary trial pursuant to Rule 9-7?
2. Does the doctrine of estoppel prevent the Tenant from asserting it did not exercise its option to renew the lease?
3. Did the Owner comply with its obligations under the Lease, and if not, did such non-compliance constitute a fundamental breach of the Lease?
4. Is the Owner entitled to three months' accelerated rent and prospective rent for the renewal period?
5. Has the Owner mitigated its damages?
6. Are the Defendants entitled to a set-off?

7. Is the Indemnifier bound by the terms of the Indemnity?
8. Can the Owner recover special costs and interest at a rate of 3% above prime on any amounts it is owed pursuant to the Lease?

Held

1. Is the claim suitable for a summary trial pursuant to Rule 9-7?

The Court stated that parties must come to a summary trial prepared to prove their claim or defence as judgment may be granted in favour of any party, regardless of who has brought the application, unless the court concludes it was not possible to find the facts necessary to decide the issues or that it would be unjust to do so (*Gichuru v. Pallai*, 2013 BCCA 60 (BCCA) at para. 32).

The Owner conceded that the amount at stake in the action was significant, but argued there was little conflict in the evidence regarding the relevant facts. The Defendants argued the matter was too complex to be determined summarily, and they argued there were critical conflicts in respect of the parties' intention to review and the conduct of the Owner, which the Defendants argued constituted a fundamental breach of the Lease.

The parties agreed that the relevant factors for determining the appropriateness of summary disposition were addressed in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 BCLR (2d) 202 (BCCA) ["*Inspiration Management*"]. The Court acknowledged while there was some conflict with respect to the issue of the Tenant's allegation the Owner breached its covenants under the Lease but, based on *Inspiration Management* the presence of some conflicts does not preclude determination of a matter by summary trial. Rather, it was about whether those conflicts prevent a court from findings the facts necessary to decide the matter. Here, the Court found it could ascertain and find the necessary facts and that it would not be unjust for it to do so.

2. Does the doctrine of estoppel prevent the Tenant from asserting it did not exercise its option to renew the lease?

The Court determined there was no basis for the arguments made the Plaintiffs relied on the doctrine of issue estoppel to argue the arbitrator's final decision was binding on the Tenant in the action. The Tenant noted that the issue of estoppel allows for the exercise of judicial discretion to ensure no injustice results from its application. It was argued by the Defendants, that an injustice may arise when there is a significant difference between the purposes, process, or stakes involved in the two proceedings and that it was unjust for the arbitrator to "bootstrap" himself to determine the validity of the renewal option when the defendants denied a renewal had occurred.

3. Did the Owner comply with its obligations under the Lease, and if not, did such non-compliance constitute a fundamental breach of the Lease?

The Court considered the issue of fundamental breach, as alleged by the Tenant against the Defendants. Specifically, it was alleged that Can-Faith failed to discharge its obligations pursuant to the terms of the Lease, because:

- The Premises were not maintained in a good state of repair; and
- Turner substantially increased its management fees payable under the Lease, thereby fundamentally altering an essential term of the agreement.

The Court examined the law of fundamental breach through the decision in *Guarantee Co. of North America v Gordon Capital Corp*, [1999] SCR 423 where the Supreme Court of Canada acknowledged fundamental breach as a failure in the breaching party's performance of its obligations under the contract that deprived the non-breaching party of substantially the whole benefit of the agreement. According to the Court, the test was followed by the British Columbia Court of Appeal in *Doman Forest Products Ltd v GMAC Commercial Credit Corp – Canada*, 2007 BCCA 88.

The Court found no evidence of communications between the parties relating to fundamental breach of the Lease at the time of termination. The Court found the Defendants' position on the issue of the condition of the Premises had some merit but was not strong enough to establish that they were deprived of the whole benefit under the Lease. Further, at no time did the Tenant inform Can-Faith, or its agent, Turner, that it elected to rescind the Lease because of Can-Faith's breaches of obligations under terms of the Lease.

According to the Court, the increase in management fees and their relationship to fundamental breach could not be established because the Defendants introduced no expert evidence from anyone qualified to offer an opinion on the reasonable range of management fees for comparable real estate in the Vancouver area at the relevant time.

4. *Is the Owner entitled to three months' accelerated rent and prospective rent for the renewal period?*

On this issue, the Court concluded that the Owner was entitled to recover three months' accelerated rent as a complete remedy for the Defendants' breach of the renewed Lease regardless of whether the Owner provided adequate notice of its intention to pursue this avenue of relief. The Court considered whether the Owner could claim for both damages for prospective rent and the three months' accelerated rent as per a term in the Lease.

The Court took the position that the accelerated rent clause was enforceable if the Owner "re-enters the Leased Premises or if the Lease is terminated by any event set out in clause 15.3" (at paragraph 102). The Court determined that the accelerated rent clause was a liquidated damages clause and that the only reasonable interpretation of the clause was that it provided a pre-contractual estimate of damages in the event the Tenant breached the Lease. The Owner, in seeking to enforce this clause, effectively elected to accept this amount as a complete remedy for the breach specified. The Court also found that there were no reasons to view the clause as a penalty clause.

5. *Has the Owner mitigated its Damages?*

On the evidence presented, the Court accepted that the Owner properly took steps to mitigate its damages. Specifically, the Court identified the fact the Owner hired a commercial real estate broker to list and market the premises.

The Court took the position that the onus of proving failure to mitigate was on the defendants, and in this matter, the Court found that the Defendants did not examine the Plaintiffs' representatives for discovery, and adduced no evidence in support of the conclusion the Owner failed to properly mitigate.

6. *Are the Defendants entitled to a set-off?*

At trial, the Defendants claimed that they ought to be able to claim a set-off against a water leak that occurred in April 2017, where they paid $8,744.20; excessive property management fees in 2016 in the amount of $21,419.46; and the balance of the Tenant's security deposit in the amount of $17,539.37.

On review of the evidence, the Court indicated it was not satisfied the Tenant was entitled to a set-off for the water leak repair. The Owner relied on an article in the Lease (Article 5.4) which set out that the Tenant covenanted not to commit or permit any waste or injury to the building or the Premises including leasehold improvements and trade fixtures. The Landlord had invoiced for the repairs in January 2017 via letter and the Defendants paid the invoice. At trial, the Defendants claimed it was paid under protest. The Court found no reason to permit set-off for the $8,744.20 in water leak repairs.

With respect to the management fees, the Trial Judge could not conclude that the Tenant's share of Turner's management fees supported the $21,419.46 claimed as a set-off by the Defendants. The Court concluded that because the Owner was entitled to rental arrears and liquidated damages for accelerated rent, the Defendants were entitled to a credit in an amount equal to the remainder of the security deposit as a set-off against the final award.

7. *Is the Indemnifier Liable Under the Indemnity?*

The Court found the Indemnifier was not relieved of his obligations under the indemnity. The Indemnifier did not dispute the validity of the Indemnity Agreement at trial but argued it was materially altered to his detriment when the management fees payable under the lease were significantly increased. The Indemnifier relied on *Jens Hans Investments Co. v Bridger*, 2004 BCCA 340 ["*Jens*"] in support of his position.

The Court agreed with the Plaintiffs and found the case was distinguishable on the facts as in *Jens* the landlord refused to consent to a sublease and the defendant was unable to operate its business as a result. The Court found no evidence to support the increase in management fees was a material change.

8. *Can the Owner recover special costs and interest at a rate of 3% above prime on any amounts it is owed pursuant to the Lease*?

The Lease provided the following with respect to costs (at paragraph 134):

> 15.1(c) if the Tenant shall fail to pay any rent promptly when due, shall be entitled, if it shall demand it, to interest thereon at a rate of 3% per annum in excess of the Prime Rate.
>
> 15.1(d) [The Landlord] shall be entitled to be reimbursed by the Tenant, and the Tenant shall forthwith pay the Landlord, the amount of all costs and expenses (including, without limitations, legal costs on a solicitor and own-client basis) incurred by the Landlord in connection with the default or in efforts to enforce any of the rights, or to seek any of the remedies, to which the Landlord is or may be entitled hereunder.

On the basis of the above clauses, the Court found no reason to depart from the parties' agreement regarding interest and costs as set out in Article 15 of the Lease. As such, the Court found the Landlord was entitled to both costs and expenses in addition to the $5,281.24.

Conclusion

The Court found the matter was suitable for summary disposition pursuant to Rule 9-7 and that issue estoppel precluded the Defendants from taking the position the Tenant did not exercise its option to renew the Lease. Further, the Owner was entitled to liquidated damages in the form of accelerated rent and damages for the loss of prospective rent because there was no fundamental breach of the Lease by the Owner.

In respect of damages, the Court held that the Owner was entitled to damages for arrears of rent to the date of termination of the Lease in the amount of $247,921.76 and that the Owner was entitled to $12,188.61 from the defendants for expenses it incurred to repair, restore and maintain the Premises after the Tenant vacated.

The Court held the Tenants were entitled to credits in the amount of $9,152.64 (due to a 2017 common area expenses reconciliation) and $17,599.37 (representing the Tenant's remaining security deposit paid pursuant to the Lease) and that the Indemnifier was not discharged from his obligations pursuant to the Indemnity. According to the Trial Judge, the Defendants did not meet the burden of establishing the Owner failed to mitigate its damages.

Mountaineer Holdings Ltd. v Mirror Mirror Salon Inc., 2021 ABPC 150

Facts

The tenant hair salon vacated the leased premises and ceased payment just over 1 year before the expiry of the 5-year term of the lease. The landlord claimed for the rent during that period, while the tenant argued the landlord had fundamentally breached the lease and the tenant was entitled to repudiate the contract. The tenant's claim was based on issues with the property including water leaks, a rotting awning creating a hazard, smells from an animal infestation and a faulty furnace, and exterior damage that allowed snow to enter the premises. The tenant also claimed damages resulting from lost income caused by having to move the hair salon to a different premise.

Issues

1. Did the landlord's tenant amount to a fundamental breach of the lease?
2. Did the tenant's counterclaim succeed?

Held

1. Did the landlord's tenant amount to a fundamental breach of the lease?

Accepting the tenant's evidence of the condition of the property, the Court found that the conditions described amounted to a fundamental breach, at para 12:

> [12] This lease was clearly for the operation of a hair salon and related activities. The landlord has an obligation to provide a premise which is suitable for the intended purpose of the lease. The business of Mirror Mirror is personal service to its customers. They have to be able to be consistently open for business to service client appointments. The premises must be safe from water leaks and the potential results of water leakage onto light fixtures. The presence of highly unpleasant odors is inconsistent with the operation of a salon. Any requirement of having to shovel snow from within the lease premises is unacceptable. The landlord's obligation to provide premises which are free of these sorts of factors is fundamental to the very reason-for-being of the lease. I accept that the tenant had labored under these concerns for a goodly part of the term of the lease, and despite requests to the landlord, the fundamental shortcomings of the leased premises were not remedied. I conclude that the landlord's breach of the lease was fundamental and the tenant, Mirror Mirror, was entitled to repudiate the lease.

This was true even though the tenant had made a very hasty exit when it finally decided to leave. Even though discussions with the landlord about improving the property had been engaged only days before the tenant vacated the property, the Court found it reasonable for the tenant to conclude, based on the landlord's history of inaction, that nothing would be done.

The parties and the Court framed the dispute in the language of "fundamental breach". However, *Tercon Contractors Ltd. v British Columbia (Transportation and Highways)*, 2010 SCC 4 stated that the doctrine should be "laid to rest", at least in the context of whether to enforce an exclusion clause. The Court in the present case relied instead on *RIC New Brunswick Inc. v*

Telecommunications Research Laboratories, 2010 ABCA 227, released 3 months after *Tercon*, for the elements of the test for fundamental breach. *RIC* has not been substantially followed, but the elements elucidated from that case were:

1. the ratio of the party's obligations not performed to that party's obligations as a whole;
2. the seriousness of the breach to the innocent party;
3. the likelihood of repetition of the breach;
4. the seriousness of the consequences of the breach;
5. the relationship of the part of the obligation not performed to the whole obligation.

Professor Girgis has written that confusion often results when parties or Courts confuse the doctrines of fundamental breach and repudiatory breach, the latter of which survives today. A useful article on the issue can be found at https://ablawg.ca/2013/11/07/fundamental-breach-and-repudiatory-breach-of-contract/.

2. Did the tenant's counterclaim succeed?

The tenant's claim was based on two elements: the improvements it had made to the property (i.e. setting up the hair salon) and the income it lost in the week of transition between repudiating the lease and resuming operations.

The Court awarded neither. On the improvements, awarding the tenant the costs of the buildout to the premises would result in a windfall by compensating the tenant for costs for which it was rightly liable. Any loss of use of the buildout was a result of its own premature repudiation of the contract. On the loss of income, the evidence established no reason why there should have to have been a gap in operations. The tenant decided to leave the leased premises a week before it could be set up in a new location, but there was no specific reason it could not have either waited a week or set up the new premises in advance of the move.

Result

The landlord's claim for lost rent failed as it had fundamentally breached the lease. The tenant's counterclaim failed as it could not establish a valid basis for damages.

DGN Equities LP v Marshall, 2021 ABQB 348

Facts

This is an appeal from a Master's decision granting summary judgment.

The tenants leased two properties from landlords to operate a pet store. The pet store and its staff, including the defendant himself, experienced significant harassment and vandalism by animal rights protestors, to the point that the tenant decided to close down operations. With the landlord's consent, the tenant subleased to a subtenant, but the subtenant required an upgrade to the HVAC system on the premises. However, after delays in installing the new HVAC system, the subtenant declined to proceed with the sublease. By then, the old HVAC system had been removed in preparation of the installation. The tenant defaulted, and the landlord brought a claim.

Issues

1. Was there an implied term that the existing HVAC was suitable for a pet store?
2. Did the lease require the landlord or tenant to pay for the HVAC?
3. Were the landlord's maintenance obligations affected by the "as-is" provision of the lease?
4. Did the HVAC system render the premises "illegal" and the lease unenforceable?
5. Did the deficiencies in the HVAC system constitute a "fundamental breach" of the Lease?

Held

1. Was there an implied term that the existing HVAC was suitable for a pet store?

The Court held that the HVAC was a) not suitable for a pet store and b) not up to code, but the effect of this was uncertain. The subtenant had noticed issues with the HVAC system prior to moving in, and agreed with the tenant to share the costs of renovation.

The lease provided that the premises were leased "as is", though the landlord covenanted that the HVAC was in "good working order". There was also an entire agreement clause. The Court held that any implied term that the HVAC was fit for a pet store went against these express terms. Even if the tenant had proven the HVAC was inadequate for a pet store, there was no implied term that it would be.

2. Did the lease require the landlord or tenant to pay for the HVAC?

While the lease did have a provision requiring the landlord to keep the HVAC in good repair, the Court decided this point on the issue of notice. The landlord was given no notice of deficiency of the HVAC system under the lease, the tenant and subtenant simply agreed to renovate. In the words of the Court at para 47:

> [47] Notice crystallizes the position of the parties. Notice informs a landlord that a tenant considers that the landlord has an obligation under the lease. If notice is given, a landlord is able to investigate and, as appropriate, take action to correct a condition for which it is responsible. Notice allows parties to deal with problems as they arise and can trigger lease obligations. Without notice, the problem is not dealt with and the lease obligations may not be triggered.

Because the landlord was never notified of the tenant's position that it was in breach, the landlord never breached its obligations. As a result, the landlord never "refused" to correct any alleged HVAC deficiencies.

The tenant further argued that the landlord's obligation to "maintain comfortable conditions" indicated an obligation over the HVAC. The Court disposed of this by finding no evidence that this obligation had not been met and that the tenant never raised issues of comfort with the landlord.

3. Were the landlord's maintenance obligations affected by the "as-is" provision of the lease?

Apart from the fact that the lease could not relieve the landlord from its obligation to keep the premises up to code, "as-is" provisions cannot generally alter a landlord's maintenance obligations. However, given the above findings, this was not relevant.

4. Did the HVAC system render the premises "illegal" and the lease unenforceable?

The tenant relied on a report from a plumbing inspector which stated that the HVAC system was not up to code in certain places. The Court accepted that this was true, and analyzed the law with respect to statutory illegality. At paras 62-66:

> [62] I do not find that the deficiencies in the existing HVAC system, the only description of which is in the McCance Deficiency List, rendered the leasing of the Premises "illegal". The Tenants rely on ***Still v MNR (1998)***, 154 DLR (4th) 229 (FCA), where Robertson JA said, at para 48:
>
> > ...In my opinion, the doctrine of statutory illegality in the federal context is better served by the following principle (not rule): where a contract is expressly or impliedly prohibited by statute, a court may refuse to grant relief to a party when, in all of the circumstances of the case, including regard to the objects and purposes of the statutory prohibition, it would be contrary to public policy, reflected in the relief claimed, to do so.
>
> [63] Robertson JA further found, at para 54, that the "bona fides of the party seeking relief is of critical significance" and he found that notwithstanding that the plaintiff had worked without the appropriate work permit, she was still entitled to unemployment benefits.

…

[65] The case before me is most similar to the Still decision. Even accepting that the McCance Deficiency List is accurate, I still must consider it in the context that the Tenants operated The Animal House for more than 18 months. The Tenants were not aware of any non-compliance until the Subtenant dismantled the ceiling for the purpose of reconfigurating the Premises. There is no information about the seriousness of the non-compliance. Also, I have found that the Landlord was not given notice of non-compliance of the existing HVAC system until after it was removed. The Landlord acted with bona fides. There is no evidence that the Landlord refused to investigate the existing HVAC system or knowingly refused to ensure that it complied with the ABC. I do not find relief would be against public policy in this case.

[66] I do not find that the Landlord purposely ignored non-compliance. I do not find that the leasing of the Premises was illegal or that the Leases were unenforceable as a result of the existing HVAC system being non-compliant.

5. Did the deficiencies in the HVAC system constitute a "fundamental breach" of the Lease?

Noting that fundamental breach was laid to rest by the SCC in *Tercon Contractors Ltd v British Columbia*, 2010 SCC 4, the Court analyzed this question under the doctrine of repudiatory breach. This refers to a breach which deprives a party of "substantially the whole benefit" of a contract (from ***Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd***, [1962] 2 QB 26 (CA).

In this case, the tenant's claim for fundamental breach failed because it had itself occupied the premises for 18 months without any HVAC or other issues. Any problems it suffered were caused by animal rights protestors, unrelated to the landlord. Again, the absence of any notice to the landlord precluded a fundamental breach claim.

Conclusion

The Master's decision to grant summary judgment was upheld. The tenants were ordered to pay the amount owing under the lease.

SCP 173 Dining Limited v Costa Del Sol Holdings Ltd., 2021 BCSC 1252

Facts:

In December 2015, the plaintiff corporations (the "Landlord") purchased two properties and business assets from Costa Del Sol Ltd. (the "Tenant"), and the Landlord agreed to lease the properties and assets back to Tenant for an initial five-year term ending December 29, 2020. The lease included an option to renew for an additional five-year term. To properly exercise its option to renew, the tenant was required to "duly, regularly and punctually pay the Rent at the times required and… duly, regularly and punctually [observe] each of its obligations under [the] Lease."

Prior to the Tenant exercising its option to renew, the Landlord (in June of 2018) informed the Tenant that it was in default of payment of additional rent for prior years. In February 2019, the Landlord's legal counsel sent a formal demand for payment of additional rent in arrears. The Tenant requested more information on the arrears and the breakdown of same. The Landlord provided information and access to review.

On November 18, 2019, the Landlord provided notice to the tenant to terminate the lease.

Despite receiving the notice to terminate, the Tenant, on January 6, 2020 attempted to exercise its option by delivering a renewal notice to the Landlord. On May 26, 2020, the Landlord provided the Tenant with notice citing the Tenant's delivery of an invalid renewal notice. Specifically, the Landlord claimed "additional rent" arrears for the years 2016 to 2019, and also alleged the Tenant breached its obligation to keep the premises in good order and repair. As such, the Landlord claimed that the option to renew was not available to the Tenant. The Landlord brought an application for summary trial seeking a declaration that: (a) the Tenant failed to pay "additional rent" and that the tenant was in default of the lease, making the exercise of the renewal invalid; and (b) the Landlord was entitled to vacant possession and payment of "additional rent" in arrears and overholding rent for the Tenant overholding beyond the initial term of the lease.

In response, the Tenant claimed that the Landlord never delivered a statement of additional rent that was owing within 120 days of the end of the relevant fiscal period, as required under the lease. The Tenant sought an order dismissing the Landlord's application, and an order confirming the Tenant's option to renew was validly exercised, and setting "minimum rent" for the renewal term under the lease.

Issues:

1. *Is the Tenant entitled to exercise its option to renew under Article 20.1 of the Lease?*
2. *Is the Landlord entitled to collect the Additional Rent it claims?*
3. *Quantum for Additional Rent*
4. *Minimum Rent for Renewal Term*

Held:

1. *Is the Tenant entitled to exercise its option to renew under Article 20.1 of the Lease?*

The Tenant's option to renew was conditional upon having "duly, regularly and punctually paid the Rent at the times required and … duly, regularly and punctually observed each of its obligations under [the] Lease…"

The Court noted that the Tenant's right to renew depended on its compliance with these conditions precedent to the renewal. If the Tenant's defaults were not cured by the operative date, the Landlord could refuse to renew the lease. The Court held that where the performance of lease covenants is a precondition to renewal, the onus rests on the Tenant to show due performance. The Tenant had the burden of proof in showing that the preconditions were met and that it was not in default of the lease.

In this case, the Landlord alleged two Tenant lease default: (1) failure to pay additional rent; and (2) failure to keep the premises in good order and repair.

The Court cited with approval the notion that, even if a landlord failed to deliver a statement setting forth additional rent, that does not have the effect of relieving the tenant of its obligation to pay the additional rent once such a statement has been provided. But *until* such a statement had been provided, a tenant cannot be considered in breach of its obligations to pay additional rent.

In this case, the relevant questions were whether the tenant "duly, regularly and punctually paid the Rent at the times required and duly, regularly and punctually observed each of its obligations under this Lease."

Under Article 4.2 of the lease, the amount of additional rent which the Tenant had to pay was to be estimated by the Landlord, in advance. The Landlord failed to provide estimates as required by Article 4.2. The Court found that during the first 2.5 years of the tenancy, the Tenant received no notice or correspondence from the landlord regarding estimates of additional rent payable.

The Court also noted that if it were wrong and the Tenant failed to meet a condition precedent to exercising its option to renew, as alleged by the Landlord, the Court would decline to grant any order for relief from forfeiture, but would rely on additional equitable discretion discussed in Sechelt Golf & Country Club Ltd v. Sechelt (District), 2012 BCSC 1105 at para. 128. The Court stated:

> "In my view, disallowing the tenant from exercising its option to renew would be fundamentally unfair. The landlord had positive obligations to provide estimates of Additional Rent and to provide statements of Operating Costs, which it failed to do in the manner required by the Lease."

The Court went on to say that:

> "Even in the absence of an express contractual requirement, the landlord was also required to organize its contractual performance in accordance with the duty of good faith: Bhasin v. Hrynew, 2014 2021 BCSC 1252 (CanLII); SCP 173 Dining

> Limited v. Costa Del Sol Holdings Ltd. Page 29; SCC 71; Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District, 2021 SCC 7. In this context, the landlord's duty to honestly and reasonably perform its obligations can be served by providing 'all of the documents that are the basis for the annual adjustment [of additional rent]': 1877352 Ontario Inc. v. 699147 Ontario Inc., 2016 ONSC 445 at para. 30, which it did not do. Because of the landlord's failure to comply with the express contractual requirements, and its failure to 'honestly and reasonably perform its obligations', it would be unfair for the landlord to rely on any breaches to prevent the tenant from exercising its option to renew."

Because the Tenant never received any estimates of additional rent, the Tenant was not in default of the lease; the Tenant was found to have paid the rent at "all times required" as required under the renewal option. With no estimates being provided to the Tenant in the manner mandated under the lease, the Tenant was not required to pay such amount additional rent until the delivery of the statement for additional rent payable.

In addition to claiming failure to pay rent by the Tenant, the Landlord also claimed the Tenant breached its obligations to keep the premises in good order and repair. On this basis, the Landlord further claimed the Tenant failed to meet the precondition to renewal under Article 20.1(b) of the lease. There were two aspects to these claims by the Landlord in this case. First, the Landlord claimed the Tenant was liable for 50 per cent of the cost to replace the roof and atrium at the Wharf Property, as was provided in the Purchase and Sale Agreement of the Wharf Property (the "Purchase and Sale Agreement"), which was executed between the parties prior to entering the lease. Second, the Landlord claimed there were issues identified in a property condition assessment of the Wharf Property on October 17, 2020 (the "2020 PCR") that remained outstanding as of January 11, 2021.

A previous property condition report, conducted in 2015, noted deterioration of the roof in 2015, and by the time of the 2020 PCR it was noted that the roof and atrium of the restaurant and pub at that Wharf Property was near or at the end of their service life. The 2020 PCR noted recommended replacement of both, with the Landlord being entitle to 50 per cent of the cost, according to the terms of the Purchase and Sale Agreement. Specifically, under Section 4.1(13) of the Purchase and Sale Agreement, the Tenant covenanted to pay 50 per cent of the cost of roof and atrium replacement if required at the end of the initial five-year term.

But according to the Court, this did not impact the Tenant's ability to exercise its option to renew. Article 20.1 of the lease required the Tenant comply with its obligations under the lease. It did not incorporate the Tenant's covenants under the Purchase and Sale Agreement.

Regarding the other outstanding issues identified by the 202 PCR, the Court noted that many of the items being claimed for repair were also noted in the previous PCR conducted in 2015. The Court found that the remaining items to be repaired have either been repaired to their state in 2015, or are subject to exception for reasonable wear and tear. The Court was not satisfied that the outstanding repairs claimed by the Landlord demonstrated the Tenant was in breach of its repair and maintenance covenants. The Court again noted the Tenant was only required to bring the property to the state of repair it was in when the lease began in 2015. The fact that the PCR

conducted in 2015 and the 2020 PCR are essentially identical – except for some repairs that the tenant has completed or which fall under the reasonable ear and tear exception – further supports the finding that the Tenant complied with its repair covenants under the lease.

Generally, regarding the covenant to repair, the Court advised that the Tenant is not held to a standard of perfection. Unless the lease is explicit, the Tenant is not required to improve the premises, nor eliminate any signs of age. The covenant to repair requires the Tenant to put the building into a state of repair similar to that existing when the tenancy began, but the Tenant's obligations to maintain and repair are both qualified by the reasonable wear and tear exception. According to the Court, an obligation to put and keep premises in better condition than they were at the beginning of a tenancy must be expressed in plain words. In the absence of such an express provision, the tenant is only obliged to maintain, through repairs, the building as it was at the commencement of the lease.

In this case, the Court found that the Tenant was entitled to exercise its option to renew. In addition to the foregoing reasons, the Court also noted additional equitable discretion provided in the case *Sechelt Golf & Country Club Ltd v. Sechelt (District)*, 2012 BCSC 1105, for disposing of this matter. According to the Court, in this case disallowing the Tenant from exercising its option to renew would be fundamentally unfair, considering the Landlord's failure to meet its positive obligation to provide estimates of additional rent and statements of operating costs.

2. *Is the Landlord entitled to collect the Additional Rent it claims?*

The Tenant claimed that additional rent was not owing due to the conduct of the Landlord, and the equitable doctrines of waiver and estoppel. However, the Court opined that the doctrines of promissory estoppel and waiver did not prevent the Landlord from claiming the additional rent in arrears. The Court cited with approval the notion that 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. That was not the case here. The lease in this case did not provide for any consequences for the landlord's failure to provide statements as required. Specifically, it did not provide that the Landlord, after failing to provide statements, forfeited its right to collect additional rent. To the contrary, there was an express provision in the lease in which the tenant agreed that the payments of rent were to be made without any deduction or set off.

In the view of the Court, the Landlord was not estopped in this case from demanding payment of additional rent. The Court found the Landlord did not make a promise or assurance intended to affect the legal relationship with the Tenant and to be acted upon, as it did not make a promise that it would not collect additional rent. Failure to provide estimates may amount to silence, but the Court noted silence can ground an estoppel only where there is a duty to speak.

3. *Quantum for Additional Rent*

The Court found that insufficient evidence was brought before it of statements of operating costs to establish that the amounts the landlord claims as outstanding additional rent arises out of the Landlord's "actual costs and expenses of owning, maintaining and operating" the premises. The

Court further noted that where property management services are performed by an individual employed by the landlord, such services must be performed for "reasonable remuneration using fair market value guidelines with prior notification to the tenant."

In this case, there was insufficient evidence to demonstrate that the remuneration of the property manager was the actual cost and expense of the Landlord. The Court held that on the basis of evidence provided, the Court was not able to determine quantum for additional rent owing by the Tenant. Accordingly, an order was made for an assessment or accounting by a Registrar of the Court for the purpose of receiving evidence and determining if the items claimed in the statements of operating costs complied with the requirements of the lease, and whether the amounts claimed reflect the actual costs and expense of the Landlord.

4. Minimum Rent for Renewal Term?

Article 20.1(g) of the lease provided that Minimum Rent for the Renewal Term "shall be the then current fair market rental for the Premises based on similar premises in similar vicinities and shall be agreed upon between the parties by no later than three months prior to the expiry of the initial Term." Failing agreement by that date, then, at the Landlord's option, the Landlord could have the option to renew declared be null and void.

The Court found that upon exercising the option to renew by the Tenant under Article 20.1 of the lease, the parties were to negotiate the minimum rent for the renewal period in good faith. The Court was unable to determine minimum rent for the renewal term due to the applicant's failure to make an application for such determination.

The Court found that while it cannot determine this issue as part of the summary trial, the minimum rent must be determined since the Court concluded the option to renew was validly executed. If the parties were unable to negotiate the minimum rent for the renewal term, the parties would have an opportunity to file materials and written submission for determination by the Court, with the Court notifying the parties if a further oral hearing would be necessary to determine.

Peninsula (Kingsway) Seafood Restaurant Inc. v Central Park Developments Ltd., 2021 BCSC 119

Facts:

The Parties entered a lease concerning a commercial premises. The respondent landlord (the "**Landlord**") terminated the lease, due to multiple failures on the part of the applicant tenant (the "**Original Tenant**") to make rent payments on time. The Landlord then accepted an offer to lease the same premises from a new tenant (the "**New Tenant**"). The Original Tenant subsequently applied for relief from forfeiture, and the application was dismissed

Issues:

Was the Original Tenant, who was in default of the lease, entitled to relief from forfeiture?

Held:

Drawing from *Sechelt Golf & Country Club Ltd. v. District of Sechelt*, 2012 BCSC 1105, the Court noted relief from forfeiture is a purely discretionary remedy that no party is entitled to as a right; however, the Court outlined the applicable principles that ought to be considered for granting such a remedy, and those principles include:

(a) whether the sum forfeited is out of all proportion to the loss suffered (*Pope v. Potter*, 2011 BCSC 697 at para. 23);

4.

(b) whether it would be unconscionable in the traditional equitable sense for relief not to be granted (*Pope* at paras. 24-25);

(c) the applicant's conduct, the gravity of the breaches and the disparity between the value of the property forfeited and the damage caused by the breach (*Saskatchewan River Bungalows* at 504);

(d) whether there are any collateral equitable grounds which exist including the party coming to court with "unclean hands" (*600433 B.C. Ltd. v. XJ Motors Ltd.*, 2011 BCSC 1144 at para. 34); and

(e) whether the applicant is "prepared now to do what is right and fair, but must also show his past record in the transaction is clean" (*Snell's Equity* (29th ed., 1990) at 31 and 541-542.).

Having lawfully terminated the lease, the Landlord accepted the New Tenant's offer to lease. The Landlord had little practical recourse against the Original Tenant for future rent arrears or other costs or expenses incurred from the somewhat difficult tenancy. Specifically, the Original Tenant, although a company of British Columbia, had no assets in British Columbia or elsewhere, and was not in good standing with the registrar of companies. The evidence in this case also showed that whenever the Original Tenant had funds to pay the Landlord, those funds had come from China,

meaning the Original Tenant was effectively judgment-proof. During the course of the lease, the Original Tenant's conduct persistently demonstrated that it was reluctant to meet its rent obligations, and it had not been a diligent tenant at any stage during the lease term, even during the years and months preceding the Covid-19 pandemic. Conversely, the Landlord was found to be reasonable and relatively accommodating, including willingness to postpone and defer rental payments at various times throughout the lease term.

Considering all of facts, and in particular the now unconditional accepted offer to lease from the New Tenant, the application for relief from forfeiture by the Original Tenant must be denied. According to the Court, where, as here, the Landlord lawfully terminated the lease and then lawfully entered into a *bona fide* and substantial lease arrangement with an innocent third party, , there is a compelling case for allowing the third party rights to trump the wishes of the tenant in default. The Court held the presence of a third party in this case warrants the inclusion of an additional principle on the aforementioned list for the analysis of a third party's leasehold interest. In addition, the Court noted several decisions where relief from forfeiture was denied due to the interests of a third party.

According to the evidence of the New Tenant, the premises under the lease was particularly desirable, due to its location in Burnaby, and the ability for the New Tenant to establish and operate a large primary care facility at the premises under the lease. It appeared by the time of the application that the new tenant had lawful rights to sue the Landlord if it reneged on the new lease, with the possibility damages could be substantial. According to the Court, its discretion should not ordinarily be exercised so as to subject a party in the Landlord's position to third party claims where that party acted lawfully and reasonably throughout, as the Landlord had in this case.

Despite the substantial expenditures made by the Original Tenant for improvement for the restaurant it never opened, in the range of $2 million, it could not be unconscionable in equity to deny relief where the landlord acting lawfully and reasonably had engaged substantial lawful interest of a third party, which was the case here.

Conclusion:

Where, as here, the Landlord lawfully terminated the lease and then lawfully entered into a *bona fide* and substantial lease arrangement with an innocent third party, in this case with the New Tenant, there is a compelling case for allowing the third-party rights to trump the wishes of the tenant in default (in this case the Original Tenant).

Airside Event Spaces Inc. v Langley (Township), 2021 BCCA 306

Facts:

The applicant tenant (the "Tenant") entered into a 14-year lease with Township of Langley (the "Landlord") for a premises located within an airport. The Landlord subsequently terminated the lease and took back possession of the premises before expiry of lease's initial term on the basis that the Tenant breached the lease on multiple grounds, including unpermitted uses under the lease.

The Tenant brought forward an unsuccessful petition for relief from forfeiture so that lease could be reinstated. The petition judge found that all or most of the Tenant's breaches were deliberate and that the Tenant, at least in some cases, took purposeful steps to hide breaches from the Landlord. The petition judge found that after being put on notice by the Landlord that residential sub-tenancies on premises were unacceptable, the Tenant had no valid basis for believing that it was still entitled to rent out part of the premises for residential use and that the Tenant made no effort to acquire the Landlord's permission. The petition judge found that the Tenant's submissions were primarily based on its having incurred construction expenses, and that it was problematic that the Tenant sought to rely on the size of its investment when it misled the Landlord in applying for building permits with respect to the size of investments that it intended to make. The Tenant subsequently appealed this decision

Issues:

1. *Did the petition judge misapprehend the evidence in finding the Tenant intentionally misled the Landlord regarding alleged breaches to the lease?*

2. *Did the petition judge fail to consider the common law doctrines of waiver and estoppel?*

3. *Did the petition judge give no or insignificant weight to the extent of the Tenant's losses from the early termination of the lease?*

Held:

1. *Did the petition judge misapprehend the evidence in finding the Tenant intentionally misled the Landlord regarding alleged breaches to the lease?*

The Tenant did not dispute it was in breach of the lease. However, the Tenant claimed the petition judge made several errors in denying relief. The Tenant claimed the petition judge misapprehended relevant evidence, drew unsupported inferences and failed to consider the doctrines of waiver and estoppel. The Tenant further claimed that the petition judge also failed to appreciate the significance of the Tenant's loss, the disparity between that loss and damages suffered by the Landlord, and the minor nature of the breaches.

The premises in question was an airport hanger located at the Langley Regional Airport, which consisted of two bays for storing aircraft, a lower floor with office-like rooms, and an upper floor containing a furnished one-bedroom suite. The lease was initially entered into between Howard

Nielsen, who later incorporated the Tenant, through a numbered company and the Landlord. In 2017, the lease was then transferred to the Tenant with the consent of the Landlord. The initial lease was for 14 years, and the lease contained terms allowing for renewal for a further ten years, provided the Tenant met the stated renewal criteria under the lease.

The lease contained terms limiting the use of the premises to aircraft repair, overhaul, storage and tie downs without the prior written consent of the Landlord. If a business licence was required for any activity, the Tenant was to obtain that licence. Under the lease, the Tenant was not to sublet any part of the premises without the Landlord's prior written consent. In addition, the Landlord was also to have "full and free access to the Premises for inspection purposes" during normal business hours in the presence of a representative for the Tenant. It is also noteworthy that under the terms of the lease, the Tenant was not to "make or erect" and "alterations, additions, or improvements" on the premises without the consent of the Landlord. Lastly, under the lease, the Landlord would assume ownership of any "buildings, improvement, and fixtures affixed to or installed" on the premises upon expiration of the lease or its "earlier termination", as was the case in this matter.

The petition judge found several breaches occurred during the lease. Specifically, the petition judge found the following occurred:

- From September 2014 to termination of the lease, a club named "Youth Unlimited" occupied a portion of the premises and conducted activities there. The Landlord was aware of the club's presence and issued no formal notice of default, but due to the lack of notice was found to have partially acquiesced to the breach. However, the Court noted such acquiescence was predicated on a "hollow assurance" from the Tenant that the arrangement was temporary, and that Youth Unlimited would be moving to another location;

- Families occupied the furnished suite in the premises from time to time. In April 2018, the Airport Manager notified the Tenant in writing that the Landlord considered any "full time live-in tenancies" to be in breach of the lease. And despite assurances from the Tenant that that residential tenancies were not occurring and would not occur in the future, people continued to live in the suite;

- After June 2020, the Tenant allowed the Langley Flying Club to store an aircraft at the premises without the Landlord's permission, and allowed the Langley Flying Club to operate from the premises, including posting signs on the premises and using the address of the premises online;

- In April 2019, the Tenant constructed a new, two-story steel hanger at the premises with the permission of the Landlord. However, the Tenant subsequently arranged for further work, and despite being required to obtain a building permit, the Tenant did not seek nor obtain one for the subsequent alterations; and

- In May 2020, the Landlord received complaints regarding the construction and requested access to the premises for inspection. The Tenant denied this access, citing the need for Howard Nelson to be personally present, and that he was away and the inspections could not take place until his return.

On June 28, 2020, the Landlord then notified the Tenant that it considered the Tenant to be in breach of the lease for unpermitted uses, unlicensed business operations and unlawful construction. The Landlord gave the Tenant 30 days to remedy the breaches and demanded that it cease all use of the premises by unlawful subtenants, including the Langley Flying Club. The Landlord also stated it would conduct an inspection on June 30 and that the Tenant must provide access. If the Tenant did not cure the breaches within the allotted time, The Landlord noted it would consider itself at liberty to pursue remedies under the lease, including termination.

Following this notice, there was considerable back and forth between the Tenant and the Landlord, with the Tenant complaining about the Airport Manager, the bases for the alleged breached, and the manner in which the Landlord had dealt with the Tenant. In addition, Howard Nelson advised he would not be available to attend an inspection on June 30, and when pressed for an alternative date stated that until the Tenant's concerns were addressed, he would not grant access to the premises. After further discussions between the parties, on August 21, 2020, the Landlord ultimately notified the Tenant it was terminating the lease and would take possession of the premises on August 28. It was noted that upon reentry by the Landlord on August 29, 2020, it discovered tenants living in the furnished suite.

The Tenant's submissions focused on relief from forfeiture as provided under section 24 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, which bestows on the Court broad remedial powers to relieve a party against penalties and forfeitures that the Court thinks fit. In the context of a commercial lease, the Court held the guiding case for interpretation of section 24 were the factors enumerated in *Sechelt Golf & Country Club Ltd. v. District of Sechelt*, 2012 BCSC 1105, which provides the following factors for consideration:

- proportionality between the amount forfeited by the lessee and the loss suffered by the lessor;

- whether it would be unconscionable for relief not to be granted;

- the conduct of the applicant who seeks relief, including the gravity of their breaches;

- collateral equitable grounds that reasonably affect the analysis, including a party having "unclean hands"; and,

- whether the applicant is prepared to do what is right and fair under the lease.

The Tenant submitted the decisive factor in its request for relief was the size of its loss under the terminated lease, being over $440,00 paid for the premises in 2013, in addition to investments and improvements over the years exceeding $1.5 million. The Tenant submitted such losses would be particularly unjust, since it claims its breaches under the lease were either unintentional or minor in impact. On the other hand, the Landlord claimed the nature, duration and seriousness of the Tenant's breaches weighed heavily in favour of denying relief for forfeiture, and further the Tenants responses when confronted with the breaches exacerbated their severity.

The petition judge found the circumstances of the matter afforded the Tenant with a strong *prima facie* case for relief from forfeiture and noted more was needed than the mere fact of a breach under the lease to disqualify the Tenant from obtaining relief from forfeiture. However, the petition judge was ultimately satisfied that the Tenant's conduct under the lease and subsequent responses when confronted with the breaches, particularly efforts to deflect and deceive and later intemperate and an offensive personal campaign against the Airport Manager, far exceeded the threshold to disqualify it from relief.

On the totality of the evidence the petition judge found that "most if not all of [the Tenant's] problems with [the Landlord] were . . . of its own making." The petition judge found that most of the breaches were intentional and, "in at least some cases, actively concealed" from the Landlord. The petition judge also agreed with the Landlord that the Tenant's responses to efforts to enforce the lease were offensive in tone and content, were disdainful of airport management and the Landlord's rights under the lease. The petition judge found the Tenant's did not demonstrate good faith in its dealings with the Landlord. The petition judge dismissed the Tenant's application, while finding such an application was justified by the Tenant given the magnitude of its investment in the premises.

The Tenant appealed this decision from the petition judge, and the appeal was dismissed. According to the British Columbia Court of Appeal (the "Court of Appeal"), the Tenant failed to establish that the petition judge misapprehended evidence or committed a palpable error; rather, the Court of Appeal found the petition judge's findings were reasonably open to him on the evidence. The petition judge found the Tenant's response to the Landlord's April 2018 letter advising that live-in tenancies were a breach of the lease constituted deliberate misrepresentation by the Tenant regarding what had occurred and would continue to occur at the premises. The petition judge further found that the Tenant allowed people to live in the furnished suite on at least two occasions following that letter.

Regarding allegations of the Tenant misleading the Landlord in its application for the building permit to construct the two-story steel hanger, the Court of Appeal noted the conclusions about misleading the Landlord by the petition judge are not specific to the monetary value of the alterations. Instead, the petition judge found the Tenant misled the Landlord with respect to the size of the investment to the premises overall. The Court of Appeal noted the subsequent alterations without a building permit proceeded shortly after the Landlord approved the first set of alternations, with the Tenant knowing it required the Landlord's approval for the subsequent alternations and that such alternations were outside the scope of the initial building permit secured by the Tenant. In such circumstances, it was reasonable for the petition judge to conclude that as the alterations unfolded in 2019 and 2020, the Tenant misled the Landlord about the scope of the planned changes.

According to the Court of Appeal, findings of fact are reversible on appeal only when shown to be the product of palpable and overriding error. A misapprehension of evidence may meet that test; however, the misapprehension must go to the core of a judge's reasoning process before it will warrant appellate intervention. Demonstrating a misapprehension is a high standard for an appellant. The alleged error must be plainly identifiable and there must be an actual mistake. It is not enough to "merely suggest a different interpretation of the evidence, or merely point to some

evidence which arguably weighs against the trial judge's finding". On this basis, the Court of Appeal found the Tenant had not persuaded it that the petition judge misapprehended the evidence and, by so doing, that he committed palpable and overriding error.

2. *Did the petition judge fail to consider the common law doctrines of waiver and estoppel?*

Regarding the use of the premises by Youth Unlimited, according to the Tenant, the Landlord fully acquiesced in and effectively waived this breach under the lease. A waiver requires full knowledge of the relevant right and an unequivocal and conscious intention to abandon that right. In this case, there was evidence of the Landlord taking issue with the presence of Youth Unlimited at the premises, and the Tenant reassuring the Landlord through representations that the arrangement was temporary.

The Court of Appeal found that the petition judge in this case was alive to the waiver and estoppel arguments made by the Tenant, but that he was not satisfied that the evidence supported "clear acquiescence" on the part of the Landlord. Further, the Court of Appeal noted the Tenant's assurances that the arrangement with Youth Unlimited was temporary attenuated any unwritten acquiescence that may have occurred on the part of the Landlord. Referencing the case *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, 1994 CanLII 100 (SCC), [1994] 2 S.C.R. 490, the Court of Appeal was explicit in its decision that the overriding consideration in each case of an alleged waiver is whether one party communicated a clear intention to waive a right to the other party, and in this case it found no such waiver took place. Lastly, the Court of Appeal noted this particular breach was not treated as a serious one by the petition judge in arriving at his decision, and the Court of Appeal was of the opinion that even if a waiver were found to have occurred, it was not of the view that such a waiver would have made a difference on the final outcome, in consideration of the number and nature of the other breaches.

3. *Did the petition judge give no or insignificant weight to the extent of the Tenant's losses from the early termination of the lease?*

With respect to the claim by the Tenant related to the value of its investment, the Court of Appeal found the petition judge did consider the size of its investment in deciding against relief from forfeiture. The Tenant claimed on appeal that the petition judge gave inadequate consideration to the disparity between the extent of its own loss and the damage flowing to the Landlord from the breaches.

The Court of Appeal noted the petition judge considered the "conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach." Further, the Court of Appeal noted the petition judge's finding that the Tenant had a strong prima facie case for relief from forfeiture, due to the Tenant's investment. However, according to the Court of Appeal, it was the role of the petition judge to balance all relevant factors in the context of the case as a whole, and during that exercise the petition judge ultimately found that the Tenant's conduct "weigh[ed] heavily" against its entitlement to relief. In addition, the relationship between the parties was found to be "irreparably damaged", largely due to the conduct of Howard Nielsen. While the Court of Appeal noted Howard Nielsen subsequently apologized for his personal campaign against the Airport Manager, his conduct left an

"unmistakable impression" that the Tenant was "disdainful of Airport management and of [the Landlord's] right" under the lease. In that context, the Court of Appeal held it was appropriate for the petition judge to exercise his discretion as he did, "a discretion that attracts considerable deference on appeal."

In addition to the foregoing, the Court of Appeal found the petition judge was appropriate, due to his findings that the activities of Youth Unlimited and the Langley Flying Club presented a tangible safety concern, given the unique feature of an airport environment and the importance of stringent compliance with use protocol in that context. Further, the Court of Appeal found such a decision was appropriate, since the petition judge found the conduct of the Tenant destroyed the business relationship between the parties required for an effective functioning of the lease.

In this case, the Court of Appeal also noted the following language in the lease: "improvements … and fixtures affixed to or installed on the premises will remain upon and be surrendered to [the Landlord]." The fact that there was a realistic possibility that the Tenant's investment would have accrued to the Landlord in any event was found to be an attenuating feature of this case. It was also acknowledged that relief from forfeiture is generally available where the "sum forfeited is out of all proportion to the loss suffered," but it must also be "unconscionable" for the other party to retain the corresponding benefit. That is, the existence of disproportionality, even where significant, is not determinative of the analysis.

Conclusion:

Appeal dismissed

Demonstrating a misapprehension is a high standard for an appellant. The alleged error must be plainly identifiable and there must be an actual mistake.

The overriding consideration in the case of an alleged waiver is whether one party communicated a clear intention to waive a right to the other party. Assurances by the Tenant that a breach of the lease was temporary in nature was held to attenuate any unwritten acquiescence that may have occurred on the part of the Landlord.

Regarding relief from forfeiture due to the size of the Tenant's investment, it was the role of the petition judge to balance all relevant factors in the context of the case as a whole, and during that exercise the petition judge ultimately found that the Tenant's conduct "weigh[ed] heavily" against its entitlement to relief.

ARC Digital Canada Corp v Amacon Alaska Development Partnership, 2021 BCSC 1612

Facts

The plaintiff was a tenant of the commercial premises. In September 2017, the defendant landlord purchased the premises for redevelopment purposes and became the new landlord of the tenant. The lease between the parties had over one and a half years remaining on it at the time and had an option for a five-year renewal. As part redevelopment efforts for the premises, the landlord wished to negotiate an earlier end to the lease. The parties agreed to amendments to the lease that would provide for an early termination date in exchange for the landlord providing financial assistance, $580,000 payable in two instalments, to the tenant to relocate to the new premises.

The tenant refused to sign the agreement until it secured new premises. Once the tenant secured a lease and signed the lease amendment, the landlord initially refused to sign the agreement or pay the first instalment. The landlord claimed that the tenant had repudiated the agreement by refusing to sign until new premises were found.

The tenant commenced action for enforcement of terms of the agreement and the landlord counterclaimed for overholding rent. In July 2019, the landlord made an initial instalment payment of $290,000 but refused to make further payments because the tenant did not vacate the premises by June 30, 2019. The tenant did not vacate the premises until October 31, 2019 and brought application for summary trial.

In early 2020 the landlord delivered the signed lease amendment, agreeing to pay relocation costs and moving up the end of the term. The tenant, believing the matter to be largely settled, found a new lease to enter into. After the new tenant advised the landlord that it had found the new property, the landlord then refused to make additional payments under the lease amendment and disputed its validity.

Issue

1. Was the landlord's contract performance dishonest and lacking in good faith?

Analysis

1. Was the landlord's contract performance dishonest and lacking in good faith?

The tenant argued that the landlord's contract performance was dishonest and lacking in good faith in two major respects:

a) After entering into the lease modification agreement, the landlord, knowing the tenant would rely on the agreement to its detriment, stood silent while the tenant entered into a new lease. Only after the new lease was in place did the landlord try to resile from the agreement for an improper purpose; and
b) In delivering the signed lease modification agreement and the first installment only *after* the new termination date in an attempt to benefit from its own breach by that time.

The Court held that the landlord acted dishonestly toward the tenant in relation to the landlord's performance under the agreement. The Court noted that the circumstances “overwhelmingly” established dishonesty.

The agreement required that the landlord make the first instalment payment upon signing of the agreement by the tenant. The landlord did not advise the tenant that it would not proceed with the agreement, despite knowingly misleading the tenant into understanding and reasonably expecting that the landlord would then sign and perform according to the agreement. The tenant would not have signed the new lease or agreement if the landlord had advised of its intention to resile from the agreement. The landlord's actions constituted a breach of agreement and breach of the landlord's duty of good faith in performance of the agreement. Had the landlord performed its obligations under the agreement, the tenant would have vacated the premises by June 30, 2019.

The landlord’s failure to execute the lease modification agreement and to make the initial payment of $290,000 to the tenant, and its later conduct, constituted a breach of the lease modification agreement and a breach of the landlord's duty of good faith in its performance of the lease modification agreement.

In all the circumstances, the tenant reasonably expected that the landlord would fulfill its obligations under the lease modification agreement, toward the tenant vacating the premises on the negotiated terms, just as the landlord initially wanted.

In all the circumstances, the interests of justice and fairness in the context of these contractual arrangements demand that the tenant have a remedy.

Held

The Court held that the tenant was entitled to damages for the second instalment payment of $290,000 plus $79,260 for rent paid to October 2019.

Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District, 2021 SCC 7

(Note: this is often pronounced "WAZ-teck" in legal circles, but as it's a waste disposal company it is probably meant to be pronounced "WASTE-eck")

Facts

The Wastech was hired by "Metro" over a long period to transport waste to three landfill sites, as allocated by Metro in its absolute discretion. Wastech was paid varying rates for transport to each landfill, with the furthest site attracting the highest rate. The contract also set a target profit for Wastech, with deviations from the target (in either direction) being shared between the parties. For example, if Wastech exceeded its target profit ratio, it had to remit 50% of the "excess" profit to Metro. The contract did not guarantee any profit to Wastech or allow termination in the event it was not met, it merely allocated the effect of any excess or deficient profit between the parties.

Over time, Metro began allocating less and less waste disposal to the furthest landfill, resulting in lower rates and diminished profit for Wastech. During negotiations, the parties had contemplated this might happen, but they decided it was unlikely and did not include a contractual provision to address this scenario.

An arbitrator ruled Metro had breached its duty of good faith in carrying out its discretion under the contract, failing to have "appropriate regard" for Wastech's legitimate contractual interests. Metro made it impossible for Wastech to hit the profit target, which it had legitimate expectation of doing.

The BC Supreme Court overturned the arbitrator, and the BC Court of Appeal upheld the BC Supreme Court.

Issues

1. What is the content of the contractual duty of good faith?
2. Did Metro breach the duty?

Held

1. What is the content of the contractual duty of good faith?

The parties and the Supreme Court cited heavily from *Bhasin v Hrynew*, 2014 SCC 71. The facts of that decision were somewhat more complicated. An investment firm, "C", marketed education savings plans to investors through dealers. One of its dealers, "H", wanted to take over or merge with the practice of another dealer, "B". B resisted efforts by both H and C to force a merger with H. The contract between B and C had an automatic renewal provision subject to 6 months notice by either party. When the securities commission investigated C's compliance, C appointed H to oversee an audit of all dealers. B protested that H was a competitor and refused to hand over his records. C misleadingly told B that H had to keep any information confidential and pressured B into the merger. When B still refused to hand over records, C terminated the contract, with the result that B lost the value of his business and his staff were almost all poached by H.

Bhasin v Hrynew settled two questions of good faith that were previously unclear. First, there is a "general organizing principle" of good faith in contract that can act as a philosophical underpinning of more specific rules. It is described as a "requirement of justice from which more specific legal doctrines may be derived", such as the requirement that parties perform their contracts "honestly and reasonably and not capriciously or arbitrarily". Second, one of the doctrines that can be distilled from this organizing principle is the "duty of honest performance", which requires that parties do not lie or mislead each other in the performance of the contract. In *Bhasin*, C's dishonesty leading up to and exercising the termination clause was found to breach the duty.

Bhasin definitively settled the question of whether an overriding duty of good faith exists in contract, but left the limits of that duty open and largely undefined. *Bhasin* was careful not to create any more law than it needed to for the dispute in question. It also set some limits on the duty of honest performance, explicitly stating that it fell below a duty of disclosure or fiduciary loyalty. However, it left unknown the scope of the general organizing principle and what other sorts of rules might be distilled from it.

Wastech concerns a new duty under the organizing principle of good faith, the duty to exercise contractual discretion in good faith. This duty, like the duty of honest performance, operates in every contract regardless of the intentions of the parties and does not have to be found as an "implied" term. The crucial point of *Wastech* is that discretion, even unfettered discretion, must still be exercised in good faith. In the majority's words, at para 63:

> [63] Stated simply, the duty to exercise contractual discretion in good faith requires the parties to exercise their discretion in a manner consistent with the purposes for which it was granted in the contract, or, in the terminology of the organizing principle in *Bhasin*, to exercise their discretion reasonably,

The SCC notes that Canadian courts have held for many years that contractual discretion must be exercised reasonably, and that this duty is not "cut from whole cloth". However, the majority was careful to note that its use of the word "reasonable" should not be confused with other disciplines such as admin law. In the contractual context, the question of reasonableness is framed as follows, at para 69

> …to determine whether a party failed in its duty to exercise discretionary power in good faith, one must ask the following question: **was the exercise of contractual discretion unconnected to the purpose for which the contract granted discretion**? If so, the party has not exercised the contractual power in good faith.

Reasonableness is therefore not a question of whether one party suffered from the exercise of the discretion, or whether it advantages one party over the other. It is instead an issue of whether the discretion was used in a way that the parties did not contemplate its use. It is not even about whether the discretion granted was "morally opportune" or wise from a business standpoint: it is not about the "motive" of the parties. This, says the majority, ensures that good faith is upheld

while still allowing “elbow room” for aggressive self-interest and avoiding *ad hoc* judicial moralism.

The purpose of the discretion can be found either within the grant of discretion itself or within the contract more generally. A judge reviewing the contract must examine it in its entirety to form an opinion as to the “purposes of the venture” and the discretion must then be exercised with a view to “loyalty to the venture”.

The minority of Justices Rowe, Cote, and Brown took issue with the majority’s approach of inquiring into the purpose of the discretion, particularly with looking at the contract as a whole and determining in the judge’s mind what the “venture” was and what its purposes were. The proper judicial role is interpretation of the intentions as they exist in the contract, and anything else is judicially-imposed re-writing of terms. They suggest that parties should, in the grant of discretion, be able to largely immunize their actions from review with a broad grant of discretion. In this case, Wastech had bargained to protect itself from Metro’s discretion by the profit target compensation formula, so the court had no grounds to find bad faith.

2. Did Metro breach the duty?

A substantial part of Wastech’s argument was that Metro’s decision to stop allocating waste to the furthest landfill deprived Wastech of all or substantially all of the benefit of the contract. The SCC held that this was not the operative consideration in the good faith analysis. The limits of discretion are properly found within the limits of the contract itself, not with abstract notions of fairness to each contracting party. A broad grant of discretion requires that a party exercise it honestly and not frustrate the deal the parties made. It does not require that one party look out for the other’s bottom line. The fact that one party’s decision results in diminished or even no contractual benefit for the other is not dispositive.

The exercise of discretion must be connected to the purpose for which it was granted. Reviewing the contract, the Court latched onto recitals stating the purpose was to maximize efficiency and minimize costs. Accordingly, Metro’s decision to allocate its waste to a closer, cheaper landfill is directly in line with the purpose for which it was given that decision-making power.

Conclusion

The appeal was dismissed. Metro’s actions did not breach its duty of good faith.

Silverado Food Services Ltd. v Omega Developments Inc, 2020 ABQB 64

Facts

Silverado Foods Services Inc, operating as Rigoletto's (the "Tenant") leased space from Omega Developments Inc and Craig Orchard (together as the "Landlord") for a restaurant. The Landlord leased the restaurant (the "Premises") to the Tenant pursuant to the terms of a lease agreement (the "Lease").

The dispute materialized as the result of a disagreement between the parties in respect of a renovation clause within the Lease. Counsel for the Tenant appeared in chambers *ex parte* seeking an interim injunction restraining the Landlord from interfering with the Tenant's quiet enjoyment of the Premises. Counsel for the Tenant communicated specific concerns about the Landlord's interference with access and use of the loading dock, interference with use of the onsite laundry facilities, and interference in relation to parking.

An initial injunction was granted by the Judge in Chambers, with an explicit right for the Landlord to apply to set it aside on five days' notice.

The Landlord sought to set aside and vacate an *ex parte* Order, or alternatively, to stay the Order pending its appeal on the basis it was improper for the Tenant to proceed without notice to the Landlord, and the Tenant failed to provide full and proper disclosure.

The Landlord argued that based on the Affidavit in support of the Originating Application, and representations from counsel for the Tenant during the *ex parte* appearance the Chambers Judge was led to conclude there was interference justifying the interim injunction.

The Landlord deposed that as of January 1, 2020, the Tenant had not paid rent for the month of January, pursuant to the Lease. The Landlord notified the Tenant of its failure to pay on January 3, 2020 but did not take any steps to re-enter the premises. A cheque from the Tenant for rent was received by the Landlord on January 7, 2020. That was eventually rectified, but not before counsel for the Tenant appeared *ex parte*.

Counsel for the Tenant argued that there had been a snowball effect stemming from the dispute over the renovation clause which included termination of laundry access, loading dock access, and common area access, along with a notice that the deep fryer had to be moved, and then finally, termination of parking.

Issue

1. Can the Tenant's claim for an injunction succeed?

Held

1. *Can the Tenant's claim for an injunction succeed?*

The Court cited *RJR MacDonald Inc v Canada*, [1994] 1 SCR 311 (RJR) for the tripartite test used to determine whether to grant an interlocutory injunction. The Court must find:

1. A serious question to be tried.
2. Irreparable harm.
3. The balance of convenience favours granting the injunction

On the first element of the test, the Court held that the Tenant had established a serious question to be tried. On the basis of the Lease and the affidavit evidence the Tenant's claim was found as not frivolous or vexatious. Serious questions of law and fact with respect to the interpretation of the renovation clause were validly disputed. As such, the Court found those claims required determination on their merits. Additionally, the Court found the alleged implied terms with respect to: parking, common areas, laundry use, and the determination of whether the use of certain equipment complies with insurance requirements were all were serious and triable issues.

On the second part of the test, the Court found that there was no evidence of irreparable harm, and from that, the Tenant failed to extend the interim injunction. The Tenant tried to argue that it would suffer loss of profit if the Lease were terminated, and that it would suffer incalculable reputational damage if the Landlord was permitted to post a notice of lease termination in a manner that was visible to customers. The Tenant relied on *Bhasin v Hrynew*, 2014 SCC 71 for the proposition there is a general doctrine of contract law that imposes the principle of good faith: a duty of honest contractual performance.

The Court did not accept the Tenant's arguments with respect to irreparable harm because there was evidence the Tenant had multiple locations, and the Court found no evidence to show why Premises was unique to the Tenant's business, or why the Tenant would be unable to secure an alternate lease in another property. Further, the Court did not accept the potential lost profits were a form of irreparable because an accounting for profits can be completed, and a Court can award damages, if appropriate.

The Court went on to assert that even if the Tenant was able to succeed in part two of the test, it would have failed the balance of convenience step of the test because that would have interfered with the parties' contractual rights. Both parties claimed to have contractual rights in respect of the Premises. The Landlord owned the Premises and the Tenant has a leasehold interest. The Tenant argued the balance of convenience favoured preserving the status quo while the underlying dispute was resolved. However, the Court found that would interfere with the Landlord's right to exercise its contractual rights.

The Tenant's invocation of *Bhasin* did not motivate the Court to grant the remedy of an injunction. Essentially, the Court held that the requirement emanating from *Bhasin* is a simple requirement not to lie or mislead in the course of performance.

The Court awarded costs of 1.25 times Schedule C because counsel for the Tenant failed to provide adequate and complete disclosure of the facts and circumstances in the *ex parte* application. The Judge found that there was necessary information left out by Counsel for the Tenant, including

specific information about the parking arrangements, and the Tenant's lack of exclusive right to the parking spaces in question.

Conclusion

On the issue of whether the Tenant had a valid claim to a continued interlocutory injunction against the Landlord, the Court said no because the Tenant failed the second part of the test for an injunction. The Court held that some costs consequences ought to be visited on the Tenant for the failure of their Counsel to properly appraise the Court of all of the material facts in the initial *ex parte* Application.

101100002 Saskatchewan v The Saskatoon Co-ooperative Assn. Ltd., 2019 SKQB 300

Facts

The defendant, the Saskatoon Cooperative Association Ltd (the "Landlord"), owned a property in Saskatoon, Saskatchewan. In 1988 the Landlord leased the property to Interwest Development Corp. ("Interwest"). Subsequently Interwest transferred its interest, as the Owner's tenant, to Grenville Properties Limited ("Grenville"). In 2007 Grenville, in turn, leased the property to the plaintiff, 101100002 Saskatchewan (the "Tenant") whereby the Tenant operated a car wash out of the a property owned by the Landlord, pursuant to the terms of a commercial lease agreement (the "Lease").

In the spring of 2012 the Saskatoon Cooperative entered into an agreement with Grenville by which the Saskatoon Cooperative bought out Grenville's interest in the property and Grenville surrendered the lease that it had assumed from Interwest. At that time, since control of the property reverted to the Landlord.

Pursuant to terms of the Lease, with the original terms and options, the Tenant intended to continue the relationship up to 2027. The Tenant anticipated that it would continue to do business at the Property throughout the duration of the Lease.

The Landlord claimed that in 2012, it became concerned about the state of repair of the Property and retained a structural engineer to review the structural condition of the building. The engineer produced a report, which found that certain load bearing walls were in poor condition and recommended demolition of the building because of its condition (the "Engineer's Report").

The Landlord sent the Tenant a letter providing the Engineer's Report, asserted that under the Lease the Tenant was responsible for remedying the deficiencies identified within a reasonable time, requested the Tenant close its business immediately pending determination of the repair costs and the reasonable time frame, and offered a mutual termination of the Lease. The Tenant's shareholder spoke with the Landlords representative and informed him the Tenant was not in a position to undertake repairs. From that, the Landlord's representative believed the Tenant had agreed to the closure of the building for safety reasons and delivered a letter on November 2, 2012, confirming the Tenant's agreement to close the business immediately, recognized the Tenant was seeking legal advice, and extended the time for proposed remedy another week.

The Landlord fenced off the building on November 2012. On November 15, 2012, the Landlord sent the Tenant notice of the Tenant's breaches of the lease, relating to non-payment of rent and the building's state of disrepair (the "Notice"). The Tenant did not pay rent, did not take steps to remedy the deficiencies, and did not make any proposals with respect to the same.

The Landlord took possession of the Property on January 3, 2013, and terminated the Lease asserting its right to the same on the basis of the Tenant's breaches identified in the Notice. The Tenant sued on the basis it was not in breach of the Lease, and therefore, the Landlord was not entitled to terminate the Lease.

The Tenant sued for lost profit from 2013 through 2027, for breach of the lease, after the Landlord terminated the Tenant's lease on January 3, 2013. In addition to damages for lost profit, the Tenant also sued for punitive damages claiming that the Landlord's termination of the Lease was conducted in a malicious, vindictive, high-handed, arrogant, harsh, reprehensible manner motivated solely by a wish to maximize profits.

Issue

1. Was the Tenant in breach of the Lease agreement?

Held

1. Was the Tenant in breach of the lease agreement?

The Trial Judge canvassed several terms in the Lease, including provisions dealing with payment of rent, occupancy costs, condition of the premises, and quiet enjoyment. Of most relevance, the condition of premises clause and the Quiet Enjoyment clause, as described below:

> "CONDITION OF PREMISES
>
> (d) To take the Premises as is upon the commencement of the Lease and any renewal thereof. The Tenant acknowledges that it has inspected the Premises and accepts the same by the execution of this Lease.
>
> REPAIR
>
> (d) To permit the Landlord to enter and view the state of repair during business hours and upon reasonable notice, and to repair, according to notice in writing and to leave the Premises in as good repair as originally demised. Reasonable wear and tear, damage by fire, lightning and tempest or arising by virtue of any act or omission of the Landlord, its agent or servants, only excepted" (at paragraph 8).

The Court found there was a valid expense of repairs clause which stated:

> "EXPENSE OF REPAIRS
>
> (f) If the Premises, elevators (if included), heating equipment, pipes and other apparatus (or any of them) used for the purpose of heating or air-conditioning the Building or operating the elevators, or if the water pipes, drainage pipes, electric lighting or other equipment of the Building or the roof or outside walls of the Building get out of repair or become damaged or destroyed through the negligence, carelessness or misuse of the Tenant, its servants or agents, employees or anyone permitted by it to be in the Building (or through it or them in any way stopping up or injuring the heating apparatus, elevators, water pipes, drainage pipes, or other equipment or part of the Building), the expense of any necessary repairs, replacements or alterations shall be paid by the Tenant to the Landlord forthwith on demand" (at paragraph 8).

The Court canvassed the quiet enjoyment clause:

> "QUIET ENJOYMENT
> The Landlord covenants with the Tenant:
>
> (a) For quiet enjoyment" (at paragraph 9).

The Court opined on the credibility of the witnesses and determined that the testimony of the each of the individual representatives of the parties. The Trial Judge said that none of his determinations required acceptance of the evidence of one of the parties over the other.

With its eye to the circumstances surrounding the closure of the Tenant's business, the Court found it was common ground that the Tenant did not pay rent for November, 2012, or any rent thereafter. The Tenant argued the Landlord was estopped from requiring payment of rent because the Landlord locked the Plaintiff out. The Court said:

> "However it is framed, the plaintiff's argument must overcome the express lease provision, in article 8(a), that rent shall not be withheld for any reason:
> 8. The Tenant covenants with the Landlord:
> RENT
> i. To pay rent. The Tenant shall not withhold the payment of rent for any reason and the Tenant shall not make any deductions, abatement or setoff, except as specifically provided herein, from the rent or any other sums to be paid to the Landlord" (at paragraph 24).
> ii.

Based on the above, the Trial Judge said the Tenant's argument was essentially that it was evicted when the Property was fenced off on November 2, 2012. The Court then cited a prior decision of the Court in *Yuan v Mah Investments Ltd*, 2001 SKQB 108, where it was said that the breach of a covenant by *a landlord* must equate to an eviction in law before the *tenant* is relived of an obligation to pay rent as opposed to being obliged to seek damages or other remedies in law or equity. The Court accepted that proposition and found that the November 2, 2012 Property closure did not amount to a termination of the lease because the Landlord clearly communicated to the Tenant that the lease remained in force. The Court drew specific attention to the fact the Landlord issued the Notice and sought payment of the rent with the express purpose of avoiding termination of the Lease.

The Court found estoppel was not properly pleaded by the Tenant, nor had it been established on the facts. Further, the Court found that the Landlord did not mispresent anything around the time of closure – the Landlord relied on a discussion with the Tenant's sole shareholder confirming an agreement to close.

The Court found there was no merit to the Tenant's unjust enrichment claim as there was evidence of a juristic reason for any enrichment experienced by the Landlord as it was the Tenant who breached the terms of the lease by not paying.

Conclusion:

The Action was dismissed because the Tenant could not establish in law that the termination of the Lease was improper or a breach of the Terms of the Lease, primarily because the Tenant breached the Terms of the Lease by failing to pay for months of rent when the Lease had not been terminated.

Whyte Avenue Landscaping v 406362 Alberta Ltd, 2022 ABQB 266

Facts

The landlord had seized the defendant tenant's assets under the "landlord's distress" provisions of the *Civil Enforcement Act*. The tenant applied for an injunction releasing its assets on the basis that no rent was owing, that its equipment was critical to its business, and that an undertaking to pay damages was sufficient security for the landlord. The landlord alleged that over $800,000 was owing in rent, which justified the distress, and more importantly that an injunction would under its effectively secured position.

Issues

1. Was an injunction warranted?

Held

1. Was an injunction warranted?

The injunction test, in the context of the *Civil Enforcement Act*, is not the well-known tripartite *RJR MacDonald*, or at least that test was subject to a threshold as set out by the *Act*. In particular, the *Act* authorized only injunction relief "necessary to secure interests of any person in property that is subject to civil enforcement proceedings" (under section 5).

The tenant was asking for the distress to be cancelled such that the rent dispute could be solved later. This, per the Court, was not protecting property subject to civil enforcement proceedings because it was in reality effectively cancelling those proceedings. The injunction provision could not operate to undermine the entire civil enforcement proceeding. Citing *Rapid Transit Mix v CommCorp Financial Services*, 1998 ABCA 63 (and the underlying Queen's Bench action), the Court held that the scope of injunctive relief in this case was limited. It cannot override rights in collateral or give them to a different person. The spirit of injunction provisions similar legislation (the *Personal Property Security Act*) was to relieve against an otherwise detailed and inflexible system. But the basic point of the legislation is to allow the creditor to realize on security, and the injunction provision does not allow a court to upset a valid seizure (quoting *Andrews and Trotchie v Mack Financial (Canada) Ltd. et al*., [1987] 61 Sask R 311 (CA)).

The landlord's position under distress was anchored in the statute. Injunctive relief was not a side door for undermining that position, and its scope was narrowed in the civil enforcement context. The release of the assets should only be made when the Court decides their fate in the context of civil enforcement proceedings or the bailiff otherwise decides so. Civil enforcement does not consider "upstream" processes for resolving the underling landlord/tenant claim.

It was noted that the tenant was not seeking a mere stay (i.e. bar on selling assets) pending resolution of the underlying claim. The tenant's recourse may lie in a replevin claim to gain use of the assets until the claim could be resolved, though this often requires posting security in the amount of the assets. The tenant's application, if granted, would effectively move the landlord from a secured to unsecured position. Injunctive relief was not an appropriate vehicle to dislodge that position.

Held

The injunction was denied on the basis that it was inappropriate, given the civil enforcement context of the application.

Mimi's Parlour Ltd v 1816112 Alberta Ltd, 2021 ABQB 254

Facts

The tenant restaurant applied for injunctive relief or relief from forfeiture against the landlord. The landlord claimed the tenant was in arrears on rent. The tenant argued the landlord owed a $300,000 for the leasehold improvements, giving a credit against which to deduct rental arrears. The tenant also alleged that the landlord failed to sign up for pandemic-related rent-relief, incorrectly accounted for rent payments, and that the tenant had overpaid rent considering the credit.

Both parties had proposed rent payment plans during the pandemic, but neither had agreed to the other's proposal.

Issues

1. Was the tenant entitled to injunctive relief?
2. Was the tenant entitled to relief from forfeiture?

Held

1. Was the tenant entitled to injunctive relief?

The tenant's position was that it had not defaulted in rent and was in a credit position. However, the Court found that the bases for this stance were not supported by evidence. First, the alleged $300,000 credit from improvements to the land was unsupported by evidence contradicted by the lease which made no mention of such indebtedness and contained a supersede clause and an entire agreement clause. The tenant's alleged overpayment of rent was based on the payment plan the tenant proposed but the landlord never agreed to. The landlord's accounting was found to be correct. The tenant had also never responded to the landlord's rent reduction proposal.

The tenant argued that the *Commercial Tenancies Protection Act* and accompanying regulation precluded terminating the lease by placing an embargo on enforcing certain lease provisions. However, that embargo expired in August 2020. Further, the regulation required that the landlord and tenant entered into a payment plan after the embargo expired. In the circumstances, the tenant's failure to respond to the landlord's plan precluded it from relying on the protections of the *Act* and regulation. The landlord was entitled to assume the tenant had no interest in entering into a plan and could therefore enforce the lease.

As for the landlord's failure to obtain a rent abatement through the Canada Emergency Commercial Rent Assistance program, the court followed Ontario case law which noted that the program was voluntary. Even where the landlord had signaled an intention to participate in the program, unless a binding promise to do so was made, that failure to participate has no bearing on the tenant.

On the basis of the above, the Court found there was no *prima facie* case for the tenant and dismissed the injunction application.

2. Was the tenant entitled to relief from forfeiture?

The test, taken from *Ontario (Attorney General) v 8477 Darlington Crescent*, 2011 ONCA 363, is whether enforcing a contractual forfeiture right visits an inequitable consequence on the breaching party, or where the party seeking enforcement can be vindicated without resort to forfeiture. The relevant factors are the conduct of the applicant, gravity of the breaches, and disparity between the value of the property forfeited and the damage of the breach. Conduct of the application refers to the reasonableness of the party's conduct. Where forfeiture was a means of securing payment, the fact that a breaching party had paid amounts owing could obviate the need for forfeiture. The disparity in value is a "proportionality analysis" of the property surrendered versus the amount owing.

Justice Lema, as is his style, summarized the principles drawn from the case law in depth.

Alwell Mechanical Ltd v Royal Bank of Canada, 1985 ABCA 193 emphasized the disparity and proportionality factor. The tenant had put more than $400,000 into improving the property, against default arrears of $90,000. The windfall that would result to the landlord from forfeiture was held to be so out of proportion that equity intervened to correct the injustice. However, the Court of Appeal also set out that the tenant had to pay the full arrears by December 31st of that year and, despite its success on appeal, pay solicitor and client costs of both the appeal and the action below by that same date, or else the right to forfeiture would be reactivated.

Canpar Holdings Ltd v Petrobank Energy and Resources Ltd, 2011 ABCA 62 similarly noted proportionality as an issue where the value of the loss was 4.5 times the value of the tenant's improvements to the premises.

1198816 Alberta Ltd v Bourbon Lounge Inc, 2008 ABQB 600 declined to grant relief from forfeiture because the tenant had not come to court with clean hands. Failure to remedy its own breaches precluded it from obtaining equitable relief.

Bank of Montreal v Phoenix Rotary Equipment Ltd, 2007 ABQB 86 rejected a landlord's argument that it would lose $2 million from lost increased rent if not allowed to exercise forfeiture. The proportionality question is not about whether the landlord would *lose* a windfall, only whether it would *gain* a windfall by being allowed forfeiture. Loss of windfall was no reason to deny relief.

Rahawanji v. Gwendolyn Shop (1973) Ltd., 2011 ONCA 771 held that the tenant, who had delayed in bringing an application and had not paid any rent in the interim (despite the landlord's offer to accept rent on a without-prejudice basis) precluded equitable relief. There was also no evidence that allowing forfeiture would create real risk of the demise of the tenant's business.

Ontario International College Inc v Consumers Road Investments Inc, 2020 ONSC 6772 declined relief based on all 3 factors of the test. The tenant had missed or bounced several payments throughout tenancy, including after understandings to make payments had been reached between the parties. The gravity of the breaches were significant and several, including continuous arrears and failure to provide financial information. The landlord had been patient

and accommodating, taken steps to mitigate its losses, and lead the court to conclude that the right of forfeiture was being exercised for reasons beyond securing payment of money. Finally, the tenant could prove only $200,000 in improvements against arrears of over $500,000, so no disproportionality was found.

2487261 Ont Corporation v 2612123 Ont Inc, 2021 ONSC 336 held that landlord-created uncertainty over whether it was applying for pandemic relief could be a factor in denying relief, if it had lulled the tenant into a sense that relief would be forthcoming. While *Hunt's Transport Limited v. Eagle Street Industrial GP Inc*., 2020 ONSC 5768 rejected a broad invocation of the pandemic as grounds to deny relief, this was largely on the basis that no particulars were brought as to the pandemic's impact on the facts. In *The Second Cup Ltd v 2410077 Ontario Ltd*, 2020 ONSC 3684, the fact that the landlord had invoked forfeiture was seen as less reasonable given that it was after a failure to pay 25% of one month's rent (by a 10-year tenant) during a pandemic shutdown.

Summarizing and applying the key factors drawn from the above cases, Lema J held that though the tenant had been haphazard in paying arrears, it had squared these up at times and the landlord had effectively acquiesced to such payments. The arrears in question had accrued during the COVID-19 pandemic. The tenant's assumption that the landlord would apply for rental relief was reasonable in the circumstances, and the landlord unreasonably failed to even respond to the tenant's requests that it do so. The landlord, while never asking for financial information, did not challenge the tenant's assertion that the pandemic was compromising its operations. While the tenant's actions were not perfect, the dispute was only about unpaid rent, the tenant plausibly understood that a rent-subsidy program was in effect, it was well known that restaurants were struggling in the pandemic, and the tenant paid the full amount of arrears (albeit post-termination). In those circumstances, the tenants actions were not fundamentally unreasonable.

Turning to the gravity of breaches, the tenant had allowed arrears to accrue up to $15,500 (5 months rent). The landlord could not point to any other adverse consequences from the non-payment. While the rental arrears were a material amount, they were paid in full withing 3 days of termination, which was held to "effectively counter the gravity" of the breach.

Finally, on proportionality, the tenant had invested $950,000 into improving what the landlord admitted was a "dilapidated and in disrepair" vacant building to make it suitable for a restaurant. While the tenant had never provided invoices to the landlord for these expenses, the landlord effectively took these construction costs at face value in argument, never requested an undertaking to provide evidence of those costs, and admitted to offering very cheap rent partly on the basis that renovating the property would be a "major undertaking" for the tenant. The Court was satisfied, based on the major list of improvements listed on the schedules of the lease, that the investment would at least be hundreds of thousands of dollars to improve the property. The lease in question was set to last for a further 8 years (out of a 12-year term), and so allowing forfeiture to proceed would be completely out of proportion to the consequences of the breach. Additionally, the tenant had not delayed in bringing its application, the tenant had met its rent obligation since regaining interim occupancy of the restaurant (under an injunction), and the landlord had taken no steps to lease to another tenant.

T.D.B. Holdings Ltd. v 101102382 Saskatchewan Ltd., 2021 SKQB 170

Facts

This case is about a prohibitive injunction, including interim and interlocutory injunctions. The parties signed a "build-to-suit" lease agreement where the Defendant landlord agreed to build a Wendy's fast-food restaurant for the Plaintiff tenant, which building was scheduled to open in early 2019. There was significant disagreement due to the quality of construction and payment for subcontractors, which resulted in significant delays. The landlord suspended work on the project in the fall of 2019. The parties could not reach a resolution and the landlord purported to terminate the lease. There was no further construction on behalf of the Plaintiff tenant.

The Defendant landlord entered into an agreement with another party to construct a different fast-food restaurant.

The tenant commenced an action to enforce the lease agreement, together with an application for interlocutory injunction enjoining the Defendant landlord from continuing work on constructing the different fast-food restaurant.

Issues

1. Whether to grant the application for interlocutory injunction.

Law

The test for interlocutory judgment is a three-part test.

1. The strength of the plaintiff's claim, either as a serious issue to be tried or a strong prima facie case;
2. The likelihood of irreparable harm; and,
3. The balance of convenience favoring the plaintiff.

Analysis

The tenant showed a serious issue to be tried. Under the lease, the landlord expressly agreed to construct and pay for a "build-to-suit" building that was to meet Wendy's Restaurants building standards in accordance with the tenant's plan. Although the landlord raised a defence that the tenant failed to demonstrate good faith or that the tenant acted unreasonably, the Court found that these issues would be better left for trial.

The tenant showed that there would be a meaningful risk of irreparable harm and that the tenant would lose the opportunity to have the premises developed as agreed to in the lease if the requested injunction were denied and the landlord was to develop the premises in question for another fast food restaurant party. The tenant was successful in establishing the sufficient singularity and uniqueness of the building and that it reflected a meaningful risk of irreparable harm.

The landlord also failed to establish that an award of damages against the Plaintiff tenant would not be capable of covering any harm and loss the landlord may sustain if the landlord was successful at trial. In addition, the tenant provided an undertaking to pay any damages the landlord would incur in the event the landlord was successful in trial.

The balance of convenience favoured the tenant. The interlocutory injunction was granted.

Campbell v. Campbell Estate, 2020 ONSC 4909

The tenant leased premises from the landlord to operate a tavern. A customer of the tenant rode his bicycle into an intersection and was struck by a vehicle after becoming intoxicated at the tavern.

The lease stated that the tenant was to maintain public liability and property management insurance and list the landlord as a named insured under the policy. However, the tenant failed to maintain the insurance required under the lease. The customer brought a claim against the tenant for damages, alleging that he was overserved when the tenant knew or ought to have known he was impaired. The tenant crossclaimed against the landlord, alleging the landlord had a duty of care to both the customer and the public to: (i) supervise the premises; and (ii) ensure the tenant maintained the insurance required under the lease.

The landlord moved for partial summary judgment on the issue of its liability.

The Court found the landlord had no duty of care to manage and supervise the premises. The terms of the lease required the tenant to comply with applicable laws and regulations; repair and maintain the premises; indemnify the landlord from claims arising from maintenance, use, or occupancy; and maintain insurance (including liability insurance). The Court found that none of these terms suggested the landlord was under any obligation to monitor and supervise the premises, nor was it responsible for the tenant's business operations.

The tenant argued that "commercial host liability" (which obliges commercial hosts to monitor alcohol consumption of their customers) extends to the landlords of such hosts. The Court rejected this argument. Commercial host liability stems from the special position of supplying alcohol for compensation. Customers expect the number of drinks they consume will be monitored. The Court concluded that landlords do not have this capacity to fulfill these requirements.

The Court also found that the landlord had no duty of care to ensure the tenant maintained the required public liability insurance. There was no proximity between the landlord and members of the public. The landlord and tenant are in privity of contract under the lease. For a third party to benefit from the insurance provisions, that intent must be shown in the lease agreement. Here, the Court found no such intent. The lease required the tenant to: (i) maintain public liability insurance, and (ii) name the landlord as insured. Therefore, the Court found an intent to protect the landlord from any claims, not to protect members of the public. The landlord was not responsible for the tenant failing to comply with its obligations under the lease.

The landlord's motion for partial summary judgment was granted and the landlord was found to not be liable.

Green Solutions Industries International Inc. v. Clarke Holdings (London) Inc., 2022 ONSC 1505 (Ontario Superior Court of Justice, March 8, 2022, Justice J.A. Fowler Byrne)

The tenant leased from the landlord commercial premises in a multi-tenanted property for the purpose of recycling and processing plastics. The landlord's insurance for the property was up for renewal in January 2022. After an inspection of the property in November 2021, the insurance company advised the landlord that it would not continue to insure the property due to a number of concerns, mainly: (i) the tenant utilizing highly hazardous processes; (ii) the premises' sprinkler system was insufficient for plastics manufacturing; and (iii) even with an appropriate sprinkler system in place, the tenant's poor housekeeping (plastic waste and box materials piled floor to ceiling) would be problematic in the event of a fire.

In December 2021, the landlord hired a company to inspect and review the sprinkler system in the building and it came to a similar conclusion. The landlord informed the tenant of the assessment and let the tenant know that it was unable to insure the entire property because of the tenant's use of the premises and the inadequacy of the sprinkler system. The lease provided that in the event the landlord's insurer terminates or materially reduces coverage as a direct result of the tenant's actions or use of the premises, and the tenant fails to rectify the matter within ten days of receiving notice from the landlord, the landlord may terminate the lease.

In January 2022, the landlord delivered notice to the tenant that it was in breach of its lease and the tenant would have to implement an egress/exit plan, limit piling heights and upgrade the sprinkler system to be suitable for the plastics processing operations in order to cure the breach. The tenant implemented an exit plan and reduced its piling heights, but did not upgrade the sprinkler system, taking the position that it was not their expense to undertake under the lease.

Despite the tenant's actions, the landlord was still unable to insure the whole property. The landlord contacted fourteen insurance companies who all declined coverage on the basis of the tenant's piling heights being over five feet high and the inadequacy of the sprinkler system for the tenant's use. In February 2022, the landlord terminated the lease and locked the tenant out of the premises.

The tenant brought an application to determine: (i) whether the lease was breached; (ii) whether the landlord improperly terminated the lease; and (iii) if properly terminated, whether the tenant was entitled relief from forfeiture.

The Court first determined that the sprinkler upgrade was the responsibility of the tenant under the lease and, by failing to upgrade the sprinklers, the tenant was in default of the lease. The Court found that the lease was net to the landlord, and that, based on the wording of the lease, the tenant was responsible for expenses that are for the sole benefit of the tenant or that are required only because of the tenant's use of the premises, which the upgraded sprinkler system fell under. The Court found that landlord properly exercised its right to terminate the lease when the tenant failed to upgrade the sprinkler system in the required ten-day period.

The Court then turned to the issue of relief from forfeiture. Under section 20(8) of the *Commercial Tenancies Act*, relief from forfeiture cannot be granted if, at the time of the application for relief, insurance is not in place in conformity with the covenant or the condition in the lease to insure, except upon the condition that the insurance is effected. In this case, the Court was required to

determine whether section 20(8) extends to a situation where the *tenant's use* of the premises prevents the *landlord* from insuring its entire property. The Court held that section 20(8) only applies to situations where the tenant is in breach of its covenant to insure, not where the use of the premises is preventing the landlord from being insured.

The Court then reiterated the test for granting relief from forfeiture from *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, whereby in determining whether to exercise this equitable remedy the Court must consider the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach.

The Court found that the tenant acted reasonably in trying to remedy the breach by implementing piling height restrictions and creating an exit plan in accordance with the recommendations of two companies in the fire safety field and that the tenant came to court with clean hands. However, the Court also found that the gravity of the breach was high seeing as without the upgraded sprinkler system, the landlord was unable to insure its entire property, which, based on the assessments of the various insurers, seemed to pose a serious fire hazard.

On the balance, the Court awarded the tenant relief from forfeiture for thirty days on the condition that the tenant either upgrades the sprinkler system or finds an alternate location. If the tenant chose to upgrade the sprinkler system, no operations could take place until the new system was in place and approved by an insurer and any additional insurance premiums payable on account of the tenant's use were to be passed on to the tenant.

Transport Canpar LP v 3258042 Nova Scotia Ltd, 2020 NSSC 274, reversed on appeal in 3258042 Nova Scotia Ltd v Transport Canpar LP, 2021 NSCA 84 (December 17, 2021, Justice M.J. Wood C.J.N.S., D.P.S. Farrar and A.S. Derrick)

The tenant leased premises from the landlord for the operation of a ground service shipping and transport company. The landlord bought the building in November 2011. The landlord was not aware whether the premises it leased to the tenant complied with the *National Building Code* (the "Code") prior to purchasing it. In February 2015, a portion of the roof of the premises collapsed due to a build up of ice and snow. Prior to the collapse, the landlord did not have any concerns about the structure of the roof and never removed snow or ice form the roof during the winter months. The tenant did not consider removing snow from the roof to be its responsibility either.

The tenant commenced an action against the landlord for damages for breach of lease and, in the alternative, negligence in the design, installation, maintenance, and repair of the premises. The tenant argued that the landlord was liable for the damages suffered by the tenant because the landlord was: (i) responsible for structural maintenance and repair under the lease; and (ii) the landlord breached an implied term in the lease that the building complied with the Code. The landlord argued that: (i) the roof collapsed due to an irregular amount of ice and snow, the weight of which exceeded the standards set out in the Code; (ii) the lease contained a release clause excluding the landlord from liability for damages incurred in such circumstances; and (iii) the lease contained a subrogation clause that should apply to indemnify the landlord.

The lower Court used the "business efficacy test" and "officious bystander test" to hold that it would make no commercial sense to require all alterations or repairs under the lease to comply with the Code, if the premises itself did not comply with the same Code requirements. The lower Court concluded that the parties intended the lease to contain an implied term that the premises be designed and constructed in accordance with the standards set out in the Code. The Court heard evidence pertaining to the structural soundness of the roof and concluded that if the roof had met the standard in the Code, it would not have collapsed. The lower Court held that because the roof was not constructed to the standard set out in the Code, the landlord breached an implied term of the lease and awarded $188,856.00 in damages to the Tenant.

With regard to the landlord's arguments, the lower Court found that the exclusion clause dealt with damage caused by the operation or use of the premises. Since the damage suffered by the tenant was the result of the breach of the implied term, and did not arise from the use or operation of the premises, the exclusion clause did not apply to limit the landlord's liability. The lower Court went on to find that should it be mistaken and that the exclusion clause is applicable, the landlord is still barred from using it as a defence on the grounds that the landlord was negligent.

As another defence to its lability, the landlord argued that it was within the parties' reasonable contemplation upon entering the lease that the tenant would seek recovery of any damage to its property from its insurer, and not the landlord. The tenant argued that the subrogation clause did not apply because its claim was not a subrogated claim. The tenant had not made an insurance claim and was not reimbursed for any losses from the insurance company.

The Court found that no evidence was adduced to support the landlord's submission on whether any policy was available which would cover the losses suffered by the tenant; and therefore concluded that the subrogation clause did not provide a defense to the tenant's claims.

The landlord appealed the lower Court's decision on the basis that the trial judge erred in: (i) implying a term into the lease; (ii) finding the landlord was negligent; and (iii) its assessment of damages. The Court of Appeal allowed the appeal and set aside the judgment.

The Court of Appeal found that while the lower Court correctly identified and applied the test to imply a term into the lease, the lower Court failed to first interpret the lease to determine whether it was necessary to imply a term into the lease to give effect to the parties' intention. The test was not whether it would be desirable or reasonable to imply such term, but rather whether it was necessary to imply a term to reflect the actual parties' intention.

In this case, the roof collapse caused damage to the tenant's property in the premises. The Court of Appeal stated that the first question was whether the parties contemplated the allocation of risk in the event damage was caused to the tenant's property, which firstly involves the interpretation of the lease.

The Court of Appeal requested additional submissions regarding the insurance provisions of the lease because the lower Court did not consider those provisions in determining the intention of the parties. Upon review, the Court determined that the landlord's release provision, the tenant's insurance requirements and the subrogation provision in the lease demonstrated that the parties had turned their minds to liability in the case of loss to the tenant's property and that the tenant agreed to bear that risk regardless of whether the loss was a result of the landlord's negligence or breach of contract. The tenant's failure to obtain adequate insurance coverage or make a claim under its insurance did not shift the allocation of risk to the landlord.

The Court of Appeal held that it was not necessary to imply a term into the lease to give effect to the intention that the tenant was meant to accept the risk of loss to its property. As such, the damage suffered by the tenant was its responsibility.

The Court of Appeal also noted that, while it was not necessary to rule on the negligence issue since the tenant was found to bear to the risk of loss regardless of negligent conduct on the part of the landlord, the lower Court failed to properly identify the standard of care required by the landlord and the Court's inference that such standard had been breached was unreasonable.

Ironwood Developments Ltd. v Great Pacific Industries Inc, 2019 BCSC 482

Facts

The petitioner, Ironwood Developments Ltd. (the "Landlord") had a commercial relationship with Great Pacific Industries Inc., now Save-On-Foods Limited (the "Tenant") in respect of a commercial lease involving a 35,514 square foot retail grocery store in Richmond, British Columbia (the "Premises").

The parties entered into a commercial lease on July 4, 1998 for a 20 year term, where the Tenant leased the property from Ironwood to operate a retail grocery store (the "Lease"). Section 20.1 of the lease granted the Tenant the option to renew the lease for two successive five year terms. The Tenant exercised its option to renew the lease through 2023. The minimum rent paid was governed by section 20.2 of the Lease, which set out the formula for determining rental value. The Lease also contained a dispute mechanism provision, stipulating the parties resolve disputes about minimum rent through an arbitrator, under the *Arbitration Act*.

At that time a dispute materialized regarding the potential renewal of the Lease. In brief, the parties could not reach agreement on the minimum rent payable by the Tenant to the Landlord. As a result, the parties entered into an arbitration agreement.

In the course of the arbitration proceedings, the arbitrator (the 'Arbitrator") had to consider the issue of specific terms of comparable property leases to determine the Net Effective Rental (the "NER") rate. The Landlord argued that the Arbitrator erred in calculating the NER by not properly considering they key terms of the leases of the comparable properties.

The Landlord applied for leave to appeal an arbitration award (the "Arbitration Award") in respect of a commercial lease dispute regarding a 35,514 square foot retail grocery store in Richmond, British Columbia (the "Premises").

Issues

1. Should leave be granted?

Held

1. Should leave be granted?

The Court reviewed the Arbitration Award and the arbitrator's discussion about the background of the Premises. The arbitrator opined on the NER for the Premises, stating it was $14.50 per square foot, per annum from 2014 to 2018. The Ironwood's position was the NER at the date of renewal was $33.00 while the Tenant's position on NER was $22.00 per square foot.

After a detailed review of the arbitrator's decision, the Court determined the arbitrator identified two issue – the applicability of the quantitative adjustments used by the experts and the applicability of the qualitative adjustments used by the expert.

The parties each put forward one expert at the arbitration, and experts came to separate conclusions on the value based on assessments of comparable properties. The Arbitrator found that he did not need to engage in a quantitative adjustment, because the leases for the two comparable properties examined were renewed in and around the time of the arbitration.

The Tenant took the position it, through a corporate over holder was to spend $1,500,000.00 on refreshing the space. Ironwood took the position the $1,500,000.00 was a direct financial benefit to the Landlord and would consequently impact the NER.

The Landlord took the position that the arbitrator had to determine the proper NER rate for the Tenant in order to use it as comparable when determining the premises' rent. Ironwood relied on *The Appraisal of Real Estate*, 3rd Canadian Edition for consideration of the NER and its importance:

> Effective Rent
>
> In markets where concessions take the form of free rent, above–market tenant improvements or atypical allowances, an appraiser must quantify the true effective rent. Effective rent (or actual occupancy cost) is an analytical tool used to compare leases with different provisions and develop an estimate of market rent. Effective rent may be defined as the total of base rent, or minimum rent stipulated in a lease, over the specified lease term minus rent concessions, e.g., free rent, excessive tenant improvements, moving allowances, lease buyouts, cash allowances, and other leasing incentives. Effective rent may be calculated in several different ways (at para 27).

Ironwood argued that the $1,500,000.00 renovation must be amortized over Terra Nova's ten-year rental term because the renovation was mandatory and presented a reverse Tenant inducement requiring the Tenant to incur an expense for the Landlord's benefit.

With respect to the leave issue, Ironwood argued that leave should be granted pursuant to section 31(2)(a) of the *Arbitration Act*.

The Tenant argued that leave to appeal should not be granted because the issue was a question of mixed fact and law, and pursuant to the *Arbitration Act*, leave to appeal can only be granted for pure questions of law. Additionally, they argued that leave to appeal under the *Arbitration Act* is discretionary and it should only be exercised when the party meets certain requisite tests as per section 31(2)(a), (b), or (c) of the *Arbitration Act*. The Tenant took the position Ironwood had failed to do so.

On the issue of leave to appeal, section 31 of the *Arbitration Act* provides a narrow right of appeal for arbitral decisions. Appeals of these decisions are only done by consent of the parties or when a court grants leave to appeal. Section 31(2)(a) of the *Arbitration Act* requires the court to consider the importance of the results of the arbitration to the parties and whether the determination of a point of law may prevent a miscarriage of justice. Leave is discretionary.

The Court referenced *Boxer Capital Corporation v JEL Investments Ltd*, 2015 BCCA 24 for principled reasons of the narrow right of appeal: arbitration is intended to provide a quick and final (in most cases) determination of the issue or issues. Parties are afforded such narrow scope to appeal arbitral awards because arbitration is intended to be an alternative dispute mechanism rather than another layer of litigation (at paragraph 42). The Court stated only questions of law are reviewable under the *Arbitration Act* and alluded to the Supreme Court of Canada's decision in *Housen v Nikolaisen*, 2002 SCC 33 which states a true question of law is one where the question or the legal principle is extricable from the question of mixed law and fact.

The Court noted that contractual interpretation has traditionally been considered a question of law. However, according to the Court, the Supreme Court of Canada in *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 [*Sattva*], changed the landscape regarding commercial arbitrations and determined that interpretation of a contract is a matter of mixed fact and law. The Court recognized this as a new approach to contractual interpretation.

The Court also noted that the *Arbitration Act* does not act like a privative clause, which signals deference in the context of judicial reviews and statutory tribunals. It places a jurisdictional bar on questions of mixed fact and law and is absolute, even where erroneous conclusions are reached. The Court noted that it would have been preferable for the arbitrator to set out all the relevant portions of the lease modification agreement in his decision, before accepting the Tenant's position. However, the Court found there is no obligation for an adjudicator to refer to all of the evidence or all of the arguments or cases to which he or she is referred in making a decision (citing *Newfoundland Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC).

The Judge concluded that the arbitrator addressed all sections of the lease, including section 6, and that there was no error of law.

Conclusion

The Judge, on appeal, dismissed the Application to set aside the arbitrator's decision with respect to the NER, primarily on the basis of deference, as the Court did not find an error in law that would have required the Court overturn the Arbitrator's decision. The Court also determined that the Arbitrator did consider all of the lease and the relevant arguments even though parts of his decision appeared to summarize the parties positions instead of fully setting out specific terms of the Lease.

Trenchard v Westea Construction Ltd, 2019 BCSC 1675

Facts

The plaintiff, Hugh Trenchard, was the owner of a leasehold interest in a 22 story residential building in Victoria, British Columbia (the "Tenant"). The defendant, Westsea Construction Ltd, (the "Landlord") is the lessor and registered owner of the building (the "Property"). The relationship between the parties was governed by the terms of a lease agreement (the "Lease").

The Tenant alleged that the Landlord breached the Lease and pled to recover his proportionate share of costs for the building restoration project that started in July 2016 and was substantially completed by May 2017. The Tenant alleged that the Landlord improperly charged the Tenant, and other tenants, for wear and tear capital costs as operating expenses, contrary to the Lease.

Originally, the Tenant had filed pursuant to the *Class Proceedings Act*, RSBC 1996, c. 50, but never pursued certification of a class action in this matter.

The Landlord commenced a two-phase building restoration project at the Property in 2010. Phase 1 involved the replacement of corner windows and windows on the east and west sides of the Property which was undertaken before the Tenant purchased its leasehold interest. Therefore, the dispute relates to Phase 2.

As per a term of the Lease, the Landlord covenanted to oblige the Tenant to complete the maintenance and repair of the Property. As per the Lease, the Landlord could charge the Tenants the amount it pays to satisfy these covenants as 'operating expenses' provided it [the Landlord] exercises 'prudent and reasonable discretion' in incurring them. As per the Lease, the Landlord was obligated to prepare an estimate of operating expenses for the calendar year based on the previous years' experience.

In 2013, the Landlord engaged a professional engineering firm, to review the condition of the building envelope, roof, and membrane of the Property. Based on that review, the tenants of the Property received notice in November 2013 of the estimated operating expenses for 2014 (the "Notice"). The Notice outlined a three year phased project for the replacement of windows and doors for three million dollars (the "Project"). The Tenant wrote to the Landlord disputing the Landlord's capacity replace windows and doors at the Property and properly charge the Tenant the costs as operating expenses under the Lease.

In the Notice, the Landlord took the position the expenses for the replacement of doors and windows fit within its obligations to keep in good repair and condition the outer walls of the Property and that replacement, as opposed to maintenance of the windows and doors related to the structural integrity of the Property.

The Tenant paid $37,155.92 under protest and demanded its proportionate share of the project costs. The Tenant took no issue with the amount charged to it for the repair of the outer walls of the Property so, it was actively disputing 75% of its proportionate share in the work completed.

The Lease contained three provisions in the Lease relevant to the parties' dispute:

> 4.03 To repair and maintain each of the Suites including all doors, windows, walls, floors and ceilings thereof and all sinks, tubs and toilets therein and to keep the same in a state of good repair, reasonable wear and tear and such damage as is insured against by the Lessor only excepted; to permit the Lessor, its agents or employees to enter and view the state of repair; to repair according to notice in writing except as aforesaid and to leave each of the Suites in good repair except as foresaid.
>
> 5.03 To keep in good repair and condition the foundations, outer walls, roofs, spouts and gutters of the Building, all of the common areas therein and the plumbing, sewage and electrical systems therein.
>
> 7.01 "Operating expenses" in this Lease means the total amount paid or payable by the Lessor in the performance of its covenants herein contained (save and except those contained in Article 5.11) and includes but without restricting the generality of the foregoing, the amount paid or payable by the Lessor in connection with the maintenance, operation and repair of the Building, expense in heating the common areas of the Building and each of the Suites therein (unless any of the Suites are equipped with their own individual and independent heating system in which event the cost shall be payable by the Lessee of any such suite) and providing hot and cold water, elevator maintenance, electricity, window cleaning, fire, casualty liability and other insurance, utilities, service and maintenance contracts with independent contractors or property managers, water rates and taxes, business licences, janitorial service, building maintenance service, resident manager's salary (if applicable), any legal and accounting charges and all other expenses paid or payable by the Lessor in connection with the Building, the common property charges or the Lands. "Operating expenses" shall not include any amount directly chargeable by the Lessor to any Lessee or Lessees. The Lessor agrees to exercise prudent and reasonable discretion in incurring Operating expenses, consistent with its duties hereunder.

The parties agreed at trial that the Lease was not governed by any legislation.

Issues

1. Was the Landlord obliged under the Lease to undertake the Project?
2. Was the Landlord entitled to charge the Tenant his proportionate share of the Project as operating expenses?

Held

1. Was the Landlord obliged under the Lease to undertake the Project?

In order to assist with determining this issue, the Court set out a series of general propositions relating to contract interpretation. First, the Court noted that the overarching goal of contractual

interpretation is to give effect to the parties' intentions at the time the contract was formed. That means giving practical effect or, in commercial settings, to give business efficacy to the parties' Lease. The Court cited *Westbank Holdings Ltd v Home Depot of Canada Inc*, 2015 BCSC 418 for the proposition the purpose of interpretation is not to rewrite the parties' contract or to relieve one of them from the consequences of an improvident bargain. Further, the Court cited *BG Checo International Ltd v British Columbia Hydro and Power Authority*, [1993] 1 SCR for the proposition in giving effect to the parties' intentions, words in a contract must be given their 'ordinary and grammatical meaning' and must be interpreted in light of the contract as a whole.

The Court noted that Courts will deviate from the plain meaning of words only if the literal construction of a contract leads to an absurdity which reasonable people cannot be supposed to have contemplated in the circumstances: *Toronto (City) v. W.H. Hotel Ltd.*, [1966] SCR 434 at 440. While the Court may consider the surrounding circumstances when interpreting the contract, "they must never be allowed to overwhelm the words of that agreement": citing *Sattva Capital v Corp v Creston Moly* Corp, 2014 SCC 53 at para 57.

In its decision in this action, the Court specifically looked to *JEKE Enterprises Ltd. v. Northmont Resort Properties Ltd.*, 2017 BCCA 38 ["*Jeke*"], the Court held the meaning of a defined term in a lease is not determined by commercial or accounting usage of the term and that parties are free to define words or phrases in a manner which differs from their ordinary usage.
In its analysis of this issue broadly, the Court examined four specific sub-issues:

A. Are windows, sliding doors, and exhaust fans properly considered part of "outer wall" repairs in the context of the relevant article in the Lease (article 5.03)?
B. Was the project necessary pursuant to the lessor's obligations to keep the foundation and the outer walls in "good repair and condition"?
C. Was the Landlord obliged to undertake the Project?
D. Did the Project result in betterment?

A. Are windows, sliding doors, and exhaust fans properly considered part of "outer wall" repairs in the context of the relevant article in the Lease (article 5.03)?

On the first sub-issue, the Court considered evidence from both sides, including evidence from engineers and architects. The Tenant asserted at trial that the outer walls of the Property could have been repaired without replacing the windows. However, he provided no expert evidence to support his position on that point. The Landlord cited *Holiday Fellowship v Viscount Hereford*, [1959] 1 ALL ER 433 (Eng CA) to support its argument that windows are not walls. However, it conceded that even in that case, Lord Ormerod identified two features that could bring the windows within the description of walls. First, if they support the structure of the building. Second, if they enclose the building face. The Tenant argued that in fact, the exterior windows were not part of the outer walls because they do not encase the building face and they do not support the structure.

The Landlord relied on evidence from the professional designers who concluded the windows, sliding doors and fans collectively form an integral part of the building envelope and that it was not possible to complete outer wall repairs without addressing the failing windows, doors, and fans, which were essential for ensuring adequate moisture control.

Based on the foregoing, the Court concluded that the outer wall repair was not possible without replacing the windows, doors, and fans at the same time. Therefore, the Court concluded that in the context of article 5.03 the proper interpretation of 'outer wall' includes glazing assemblies and exhaust fans. The Trial Judge concluded that

> "it would be illogical to conclude the parties intended outer wall repairs occasioned by reasonable wear and tear would not also include repairs to failing windows and sliding doors necessary to ensure the integrity of the [b]uilding envelope and, by extension, the [b]uilding structure." (at paragraph 55).

As such, the Court concluded that the only commercially efficacious interpretation of the Lease was one that allowed the Landlord to replace the various building components already identified.

The Court interpreted the difference between Article 5.03 and 4.03, concluding that if Article 5.03 modifies Article 4.03, it does not result in a rejection of Article 5.03 as repugnant on the basis of a commercially reasonable interpretation of the Lease.

B. Was the project necessary pursuant to the lessor's obligations to keep the foundation and the outer walls in "good repair and condition"?

In considering this issue, the Court again turned to an assessment of the expert evidence and noted the Tenant admitted, or did not dispute, several facts related to the Property's known water leakage and water ingress problems. Several experts testified as to the building condition and the Court found there were several issues with the glazing system, including water ingress.

On this point the Court provided the following commentary:

> [91] "Reasonable wear and tear" has been interpreted to mean the reasonable use of the premises by the tenant and the ordinary operation of natural forces: *Haskell v. Marlow*, [1928] 2 K.B. 45 at p. 59. On all the evidence, I conclude the Project was intended to replace old windows, sliding doors, and fans which had deteriorated due to the passage of time and which were no longer functioning as expected due to reasonable wear and tear. Thus, it fell within the exception in Article 4.03 and was not a leaseholder obligation.
>
> [92] This Court, in *G.M. Pace Enterprises Inc. v. Tsai*, 2003 BCSC 1336 [*G.M. Pace*], held a covenant to "keep in repair" or "leave in repair" is an obligation to keep the premises in the condition they were in at the beginning of the term. On all the evidence, I conclude there was a water ingress problem at the Building in 2016 which would have worsened if not addressed, thereby causing the Building to fall into a serious state of disrepair. I am satisfied the Project was necessary to "keep in good repair and condition" the "outer walls" of the Building, pursuant to Article 5.03.

As such, the Trial judge was satisfied the Project was necessary to 'keep in good repair and condition' the outer walls' of the Building pursuant to Article 5.03 of the Lease.

C. Was the Landlord obliged to undertake the Project?

On this sub-issue, the Court acknowledged that the Tenant conceded that Article 4.03 of the Lease outlined the lessee's obligations and one such covenant was to repair and maintain the suites, including windows, doors and walls, and to keep them in a good state of repair, reasonable wear and tear and such damage as was insured against the Lessor only expected. Further, the Court found that the Tenant conceded that repair of outer walls fell within the Landlord's covenants in Article 5.03 of the Lease.

The Tenant argued that while the building components were damaged due to reasonable wear and tear, nobody was obliged to undertake the repairs but, if the Landlord elected to make the repairs, it must bear the associated cost. The Landlord argued the obligation to undertake the repairs belonged to it as the lessor. The Tenant cited the *Short Form of Leases Act*, RSBC 1960, c 357 [the "*SLA*"], which expressly excluded reasonable wear and tear from the lessee's obligation to repair and maintain. According to the Tenant's argument, the effect of Article 4.03 and the imported meaning of the phrase 'leave in good repair' contained within the *SLA* means the Tenant is never liable under the Lease for costs to replace 'old and warn things.' The Tenant also put the decision in *Parsons Precast Inc v Sbrissa*, 2012 ONSC 6098 ["*Parsons*"] before the Court to support his position that a landlord was 100% liable when items fall within reasonable wear and tear exception and require replacement.

The Court found the facts in this matter were distinguishable from the *Parsons* decision, primarily on the basis of the duration of the lease. In *Parsons*, a 20-year commercial lease was at play, and the owner wanted to make improvements to a parking lot with only 14 months left in the term. In *Parsons* the Court found that it would not be reasonable for the Tenant to share in the cost of replacing when the paving job has a 20 year life expectancy but there are only fourteen months left in the lease.

The Trial Judge decided the following on this point:

> "I am not persuaded by the plaintiffs argument the Lease obliges neither leaseholders nor the lessor to undertake the repair or replacement of deteriorated Building components damaged due to reasonable wear and tear. I conclude such an interpretation would lead to an absurd result which the parties could not reasonably have contemplated when they entered into the Lease. If neither party was obliged to undertake the Project and this work was not completed, the evidence confirms the Building would have fallen into disrepair and may not have survived the term of the Lease" (at paragraph 108).

The Court also concluded that on a plain reading of Article 5.03, in concert with the relevant authorities, notably, *Jeke*, the relevant building components had deteriorated, the windows, doors and fans required replacement, the Tenants were not obliged under the Lease to replace the components in their suites for damages due to reasonable wear and tear, as requiring individual

Tenant to do so would be impractical and expensive. According to the Court, Article 5.03 was reasonably construed in the context of the Lease as a whole as obliging the Landlord, as lessor, to replace the failing components, as contemplated by the Project, and to conclude otherwise would result in a logical absurdity inconsistent with commercial efficacy.

D. Did the Project result in betterment?

The evidence at trial established that failing to replace the windows, sliding doors, and fans would have caused the Property to deteriorate to a state worse than its original condition. The evidence also established the windows, sliding doors, and fans replaced during the Project would require further replacement in another 25-35 years (or 20-30 years before the end of the Lease term).

The Court turned to *GM Pace Enterprises Inc v* Tsai, 2003 BCSC 1336 ["*GM Pace*"] to draw out a proposition with respect to the condition of property. According to the Court, *GM Pace*, stands says that a covenant to keep in repair was an obligation to preserve the property in the condition it was in at the beginning of the term. Plain words are required in an agreement between the parties if they intend to impose an obligation to put the property in a better condition that at the start of the commencement of the term.

On the evidence, the Court found that the project did not result in betterment because the evidence at trial failed to establish that failing to replace the building components would have caused the building to deteriorate to a state worse than its current condition. The Court found that the Project returned the Property to its original condition.

2. Was the Landlord Entitled to Charge the costs of the Project to Tenant as Operating Expenses?

The Court found that there was a contractual right of entitlement to charge the costs of the Project to Tenants as Operating Expenses on the basis of the Court's contractual interpretation. The Court found that because the Project fell within the scope of the Landlord's obligations, and because the terms of the Lease, within the context of their plain meaning, were clear, the Landlord was entitled to charge the costs as operating expenses, because the scope of the Project fell within the definition in the Lease.

Conclusion:

The Landlord was entitled to charge Tenant his proportionate share of costs of project as operating expenses. Article 7.01 which defined "operating expenses" was unambiguous and it was possible to determine meaning of operating expenses based on plain wording of Article. 7.01 construed in context of lease as whole. As the Project fell within scope of lessor's covenants to keep foundations, outer walls and roofs of building in good repair and condition, and such costs were chargeable to the Tenant as operating expenses pursuant to lease. The Landlord was obliged under the terms of the Lease to undertake the Project, because the work was necessary for the structural integrity of the Property.

Zerr v Thermal Systems KWC Ltd, 2018 ABQB 1008

Facts:

The Plaintiffs sold shares for three companies that operated roofing and building envelope to the Defendant Tenant. The Tenant entered into a commercial lease of the premises occupied by the Plaintiffs from the Landlord (which was a related entity to the Plaintiffs).

The Parties also entered into a complex share purchase agreement (the "**SPA**") that provided various limits to exposure for each side, including express indemnities with varying expiry dates. The Parties included set-off provisions in both the Lease and the SPA so indemnity claims under the SPA could be set off against the Landlord, even though the parties were different.

Both the SPA and the Lease were drafted by lawyers from both of the Parties but contained multiple inconsistencies and complexities. The SPA expressly noted that the interpretation principle of *contra proferentem* did not apply.

A section in the Lease addressed certain tenant improvements and provided that the Tenant would not construct anything on the Premises in excess of $50,000. The Lease went on to state that, notwithstanding that provision, the Landlord consented to the Tenant's proposed Improvements attached as Schedule E to the Lease. The Lease itself did not contain any mandatory obligation that the Tenant perform anything in Schedule E, however Schedule E itself stated that the "Tenant *shall* undertake the following improvements to the premises" [emphasis added].

Schedule A of the Lease stated that:

> The Landlord shall make available to the Tenant an improvement allowance not to exceed the sum of $1,200,000.00 which shall apply towards the installation of office and washrooms including water and sanitary utility and service connections to the storage building on Lot 2, and towards Tenant improvements to the main building on Lot 1, or such improvements as set forth in Schedule "E".

Schedule A continued to state that the Improvement Allowance would be paid by a set-off against the basic rent payable by the Tenant.

A Lease Amending Agreement added an entitlement for the Landlord to simply pay out the improvement Allowance in whole or in part at any time, with no reference to any accounting if the improvements listed in Schedule E were not performed.

The Landlord argued that the Lease required the Tenant to perform the improvements to the Premises. Although various improvements were proposed, the Tenant elected to perform only some of them and argued that the Lease did not require it to perform all of the all of the improvements. The Tenant alleged that it spent its entire $1,200,000 in improvements Allowance and was entitled to the full set-off.

The Plaintiffs brought an action claiming that the Tenant had obligation to make all of the improvements. The Tenant counterclaimed that it was entitled to the full set-off from the partial improvements performed.

Issues:

1. What were the Tenant's obligations with respect to the improvements?
2. Was the Tenant entitled to full set-off costs?

Held:

1. Did the Tenant fulfill its obligations with respect to the improvements?

The Court applied *Creston Moly Corp v. Sattva Capital Corp*, 2014 SCC 53 and placed contract words in the context of the whole agreement. The language in Schedule E stated that the "Tenant shall perform" certain improvements, but no provision in the Lease expressly and formally incorporated Schedule E to the Lease.

The Amendment to Schedule A allowed the Landlord to pay out the improvement allowance earlier, in whole or in part, and suggested that it was not important whether every improvement in Schedule E was performed or not. The Court inferred that the intent of this Amendment was to allow the Landlord to sell the building with the face rate shown on the lease for rent, with no remaining deduction for the improvement allowance.

Further, if the intent of the Lease was to have the Tenant complete the improvements in Schedule E, more specific specifications would be required in order to determine whether the agreement had been satisfied. As such, Schedule E could not be considered a part of the Lease as there was no certainty, and the Tenant had no obligation to perform all the improvements in Schedule E.

2. Was the Tenant entitled to set-off costs?

The Tenant argued that the provisions in the Lease effectively stated that if the Tenant had not spent the entire improvement allowance within two years, then the balance of the Improvement allowance not yet set off would be reduced to reflect the amount actually spent.

Nothing in the Lease stated that the cost of the improvements not constructed would be valued and factored into this calculation. The Court concluded that the Lease should be read with the references to the Improvements as an allowance to contribute to the cost of modifying the buildings as proposed, with no commitment to spend any money. If the Tenant did not spend at least $1,200,000, then the Tenant's improvement allowance would be reduced accordingly.

The Court also addressed a dispute resolution clause in the Lease which required an expert to be retained for "any dispute or question". The Landlord obtained expert reports which assessed the cost of construction of work not performed in Schedule E and analyzed how the rent set-off should be adjusted to reflect those costs. The Court determined that the dispute resolution clause was not applicable to contract interpretation issues and had a very limited function.

Conclusion:

The Tenant had no obligation to perform all the Improvements in Schedule E, and the application for partial summary judgment with respect to set-off costs by the Tenant was allowed. The application of the Landlord was dismissed.

Sobeys Capital Incorporated v Whitecourt Shopping Centre (GP) Ltd, 2019 ABCA 367

Facts

On January 7, 2014, the roof of Whitecourt Valley Centre Mall (the "**Mall**") collapsed above a grocery store subleased by Whitecourt IGA ("**IGA**") from the respondent, Sobeys Capital Incorporated (the "**Tenant**"). The collapse forced IGA to close, and resulted in loss of profit and rental differential, which was covered by Sobeys' insurer, FM Global (the "**Insurer**"). The Insurer commenced a subrogated action against the appellant, Whitecourt Shopping Centre (GP) Ltd. (the "**Landlord**") as owner of the Mall, to recover the insured losses and the Tenant commenced its own action against the Landlord for the cost of interim repairs to the roof. There had been three previous roof collapses at the Mall.

The Chambers Judge granted summary judgment against the Landlord for both liability and damages of the Insurer and liability alone for Sobeys. The Landlord appealed both judgments on the basis that the Chambers Judge erred in his interpretation of the lease documents, in his reliance on inadmissible evidence, and in his conclusion that the actions were appropriate for summary judgment.

The Court considered ***Heritage Capital Corp. v. Equitable Trust Co***., 2016 SCC 19 at para 21 and applied a standard of review of palpable and overriding error for questions of mixed facts and law and to determine whether summary judgment was appropriate.

Issues

1. Whether the Landlord was liable for the collapse under the terms of the lease documents?
2. Whether Sobeys had proven the quantum of damages?
3. Whether the Landlord was liable for the Tenant's interim repairs?
4. Whether summary judgment was appropriate?

Held

1. Whether was liable for the collapse under the terms of the Lease

The lease documents consisted of a head lease and an extending agreement which was created to address renovations and a re-roof in 2005 (collectively, the "**Lease**").

The head lease stipulated that the Landlord would, at its own cost and expense, maintain, repair and restore the roof and roof structure throughout the term of the Lease. The Landlord would promptly restore and repair, at its own cost and expense, any portion of the Mall which was damaged by elements or any other casualty. Further, the Landlord would indemnify the Tenant from all claims for injury or damage to property occurring on the leased premises, and the Tenant could make immediate emergency repairs to the Mall which were normally the responsibility of the Landlord. The Landlord would then reimburse the Tenant for the cost of such repairs. Remedies conferred by the lease were cumulative, not exclusive.

The Chambers Judge held that, despite numerous engineering reports, there was no conclusive proof of the cause of the roof collapse. The Chambers Judge inferred from the reports that there

were significant deficiencies in design, manufacture, and installation of the roof trusses, and an HVAC unit had been improperly placed.

The Court held that the Chambers Judge's interpretation and application of the provisions of the Lease were reasonable. The Landlord's obligation to maintain, repair and restore the roof to keep it in good, tenantable condition had a special significance considering the prior history of roof collapses and repairs, and the Landlord's obligations could not reasonably be limited to repairing damage after it has occurred. In this context, the fact that the roof collapsed was evidence that it had not been maintained in good condition by the Landlord. Nothing in the Lease imposed a requirement of prior knowledge of disrepair as a pre-condition to the Landlord's liability for breach. The Lease provided that remedies were cumulative, not exhaustive, so the Landlord was not excluded from the obligation to pay damages for a breach of a failure to maintain the roof, which was not excluded by a separate obligation to repair damage caused by snow load.

2. *Whether the respondent had proven the quantum of damage*

The Court stated that damages are the usual remedy for a breach of contract and are not excluded despite the head lease referring to other remedies for a breach of the Lease. However, damages must be proven by admissible evidence.

At Trial, the Tenant provided evidence in support of a $761,811.00 claim through a loss memo prepared by the Insurer and various schedules prepared by an accounting consultant retained by the Insurer. The individuals who prepared these documents did not swear an affidavit or provide sworn evidence in any other form, and the documents were simply attached as exhibits to an affidavit of the Tenant' officer. The Chambers Judge did not address the admissibility of the hearsay evidence and awarded damages in the amount of $761,811.00.

The Court stated that hearsay evidence is generally excluded as the author cannot be cross-examined on the evidence. In this case, it was clear that the Tenant' officer demonstrated that he had no knowledge of how the documents were created or how the amounts were calculated. Further, the Court noted that a party has no obligation to rebut inadmissible evidence. As such, the Court set aside the Chamber Judge's damages award.

3. *Whether the Landlord was liable for the Tenant' interim repairs*

The Court addressed whether the temporary repairs performed by the Tenant constituted emergency repairs and whether the Tenant was entitled to reimbursement for the cost of the repairs under the Lease.

Shortly after the roof collapse, the Landlord retained an engineering firm to provide a structural assessment and recommendations for the remediation of the roof structure. However, before remediation work could commence as suggested by the engineering firm, the Landlord became aware of some issues concerning the engineering firm's credentials and decided to retain a new engineering firm. Shortly thereafter, the Tenant proceeded to install, at its own expense, temporary internal structural shoring of the roof in order to continue its reoccupation of the store. The Tenant's officer testified that he concluded there was a structural emergency based on engineering reports and his own personal experience on how lives could be endangered.

The Chambers Judge concluded that the Tenant's installation of interim structure measures were timely and reasonable, considering that an explanation for the roof collapse could be snow burden and winter was rapidly approaching with the prospect of new snowfalls. The Court agreed that it was fair and reasonable for the Tenant to act for life, security and safety issues rather than waiting for the preparation of another engineering report. Therefore, as it was necessary for the Tenant to expend funds on an emergency basis to make the premises safe, the Landlord was responsible for compensating the Tenant for the cost of the emergency repairs.

The Court further stated that the absence of expert evidence on the issue of whether the repairs constituted an emergency did not give rise to a reviewable error on the facts. The roof had been repaired in the context of multiple previous roof failures, the inability of the Landlord to proceed with remedial work on a timely basis, the rapid approach of winter with the risk of more snow and the Tenant's entitlement to occupy the premises. The Chambers Judge was entitled to conclude, as a matter of fact, that the Tenant faced an emergency and was entitled to make emergency repairs as contemplated by the Lease.

Whether the repairs performed were necessary, effective, reasonable and recoverable, if at all, were left to a subsequent proceeding.

4. *Whether summary judgment was appropriate*

The Court considered ***Composite Technologies Inc. v. Shawcor Ltd.***, 2017 ABCA 160 at para 77 to state that summary judgment may be available before Questioning has been conducted. According to ***Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd***., 2015 ABCA 406 at para 24, the mere size and complexity of an action does not render summary judgment inappropriate. The Court then concluded that summary judgment was appropriate in this case.

Conclusion

The Court found that the Landlord was liable for the collapse under the terms of the Lease and was liable for the Tenant's interim repairs, pursuant to the Lease. The Court set aside the damages award against the Landlord in the amount of $761,811.00 with the remainder of the damages claim remitted to the Trial Court for future disposition.

North Star Grill Ltd. v Mundi North Enterprises Ltd., 2020 BCPC 243

Facts

The tenant was interested in leasing the premises for the purpose of establishing a restaurant and the parties entered into a commercial lease. The parties agreed that the landlord would be responsible for renovating the premises, and the tenant agreed to contribute to the cost of renovations up to a maximum of $30,000 in exchange for a reduction in rent. The renovations were meant to be completed in May 2019, with an occupancy date of July 1, 2019. The tenant was actively engaged in overseeing the renovation of the leased premises, but she had a falling out with the general contractor that the landlord had hired to carry out renovations. The tenant terminated the lease, and the tenant brought an action seeking damages for reimbursement of the money paid toward renovations. The landlord counterclaimed for damages arising out of the tenant's wrongful termination of the lease.

There was substantial dispute over whether the renovations were up to standard. The tenant felt that things were progressing far too slowly and that the work was “one out of ten” in quality. The contractor testified that the landlord’s standards of quality compelled him to take his time, and the tenant’s real frustration was over the appearance of the project underway. In the contractor’s words, everything looks ugly until the project is finished, and the order of operations compelled him to leave certain things unfinished (i.e. leaving floors 75% completed until the walls had been fully built and painted).

While it became clear over the course of renovations that the work would not be done on schedule, it would likely have been done by the possession date and the landlord was prepared to discuss rent reduction due to the delay. However, the tenant simply terminated the lease without discussing any reduction.

Issues

1. Is North Star, the tenant, entitled to contractual damages arising from its termination of the lease?
2. If not, is North Star entitled to equitable relief for unjust enrichment?
3. If not, is North Star entitled to equitable relief from forfeiture?
4. Is the defendant entitled to damages for North Star's repudiation of the lease?

Analysis

1. Is North Star, the tenant, entitled to contractual damages arising from its termination of the lease?

This issue turns partly on whether any breach in the renovation timeline by the landlord was a fundamental breach.

Applying the contractual interpretation principles articulated in *Trenchard v Westsea Construction Ltd*, 2019 BCSC 1675, aff’d 2020 BCCA 152, the Court was satisfied that the lease provision

dealing with compliance with provincial building requirements was not intended to give the tenant an automatic right to terminate the lease in the event that the renovations were not completed prior to the original project date. Such an interpretation would render meaningless the separate clause which specifically addressed that default.

Allowing early termination of a commercial lease is an exceptional remedy available only in circumstances under which its entire foundation has been undermined. A landlord's delay in delivering possession of the leasehold does not automatically entitle the tenant to terminate the lease. Accordingly, The Court held that the tenant must prove the defendant's failure to complete the renovations by May 24, 2019, constituted a fundamental breach of the lease.

The Court cited In *Spirent Communications of Ottawa Ltd. v. Quake Technologies (Canada) Inc.*, 2008 ONCA 92, and indicated that in determining whether a breach is fundamental, the Court must consider the nature and purpose of the contract and the benefits for which the parties bargained.

In assessing whether the fundamental breach deprived the innocent party of substantially the whole of the benefit of the contract, it is necessary to consider five factors:

(1) the ratio of the party's obligations not performed to that party's obligations as a whole;
(2) the seriousness of the breach to the innocent party;
(3) the likelihood of repetition of such breach;
(4) the seriousness of the consequences of the breach; and,
(5) the relationship of the part of the obligation performed to the whole obligation.

These factors are addressed below:

(1) the ratio of the party's obligations not performed to that party's obligations as a whole

The lease was for a five-year term with a further right of renewal for five years. The completion of the renovations was delayed for three weeks to possibly five weeks.

In considering the ratio of the defendant's obligations not performed to its obligations as a whole, and the relationship of the part of the obligation performed to the whole obligation, the Court found that a delay in completing the renovations for a few weeks was not so significant that it amounted to deprivation of substantially the whole benefit of the contract. The delay did not even impact the contracted occupancy date. In *Spirent Communications of Ottawa Ltd. v Quake Technologies (Canada) Inc.*, 2008 ONCA 92, the Ontario Court of Appeal found an anticipated six-week delay in actual *occupancy* of the premises did not constitute a fundamental breach given the lease term was for three years.

(2) the seriousness of the breach to the innocent party

If, as in *Spirent*, an anticipated delay in occupancy is not necessarily a fundamental breach, the Court found it difficult to see how a delay in completing renovations prior to the occupancy date could constitute a fundamental breach.

The tenant raised several points. The delay had caused it to miss out on an opportunity to hire experienced staff after the shutdown of another restaurant, as those workers had simply found alternative employment. As to quality of workmanship, the tenant had produced no expert evidence to refute the contractor's testimony and the Court declined to favour her opinion. She also failed to produce evidence to support an allegation that the incomplete property caused her to lose out on a liquor license. There was no evidence to suggest the building was out of compliance with inspections, and in fact a different tenant moved in and opened a restaurant 5 months after the present tenant was meant to.

Critically, under the lease the tenant had no actual right to occupy the premises while renovations were ongoing. While she stated that her intention was to train staff during this period and the incomplete renovations precluded her from doing so, this was not a right she had under contract. While the delay was a breach of the contract, it did not follow that she had lost anything else from being unable to train staff on site.

The tenant had not established on a balance of probabilities that it would have been unable to secure the necessary licenses and insurance to operate a restaurant due to delays or poor workmanship in the renovations, such that these factors amounted to a fundamental breach entitling it to terminate the lease.

(3) the likelihood of repetition of such breach

As the renovations were a one-time project, there was no likelihood of repetition of the defendant's failure to complete them prior to the tenant taking occupancy of the leasehold.

(4) the seriousness of the consequences of the breach

Based on the evidence, the Court could not find the delay in completing the renovations until after May 24, 2019, had serious consequences for the tenant. Those consequences were not of sufficient import to the tenant at the time to cause the claimant to be bothered to advise the landlord that she was, or expected to be, unable to secure the requisite employees, licenses, or insurance to operate the restaurant.

(4) the relationship of the part of the obligation performed to the whole obligation

As set out above, on May 27, 2019, the tenant was not entitled to terminate the lease or to treat it as at an end. It had the right to negotiate a further reduction in the rent arising from any delays to the renovations. Consequently, the tenant's correspondence of May 27, 2019, and June 9, 2019, constituted its repudiation of the lease.

As the tenant wrongfully repudiated the lease, the tenant is not entitled to contractual damages for amounts it expended towards the renovations. The contract does not provide for a reimbursement of monies contributed to renovations other than through prescribed or negotiated rent reductions.

2. Is North Star entitled to compensation from Mundi for unjust enrichment?

Having found that the tenant is not entitled to damages for breach of contract, the Court considered whether it was entitled to damages in equity under the doctrines of unjust enrichment or relief from forfeiture.

Citing *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, the Court held that existence of a contract can be a "juristic reason" for an enrichment. Unjust enrichment requires absence of such a reason. The Court concluded that if the landlord was enriched by the tenant's expenditures on renovations, which the Court was unable to quantify in the circumstances because there was a juristic reason for that enrichment, namely, the lease. The tenant was not entitled to compensation for unjust enrichment.

In any event, compensation for renovation cost was factored into the lease by way of a rent reduction.

3. If not, is North Star entitled to equitable relief from forfeiture?

The Court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to costs, expenses, damages, compensations and all other matters that the Court thinks fit.

The power to grant relief against forfeiture is an equitable remedy that is purely discretionary: *Saskatchewan River Bungalows Ltd. v Maritime Life Assurance Co.* [1994 CarswellAlta 769 (S.C.C.)], 1994 CanLII 100. The factors to be considered in the exercise of discretion to grant relief from forfeiture are "the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach" (at 504).

The tenant's repudiation of the lease was an extremely serious breach. The tenant had not established the monies it paid for renovations was out of all proportion to the loss that the landlord suffered as a result of that repudiation, or that it would be unconscionable in the traditional equitable sense for relief not to be granted. While the tenant lost $24,000 in renovation costs, the landlord lost three months' rent ($8,250), plus taxes and utilities, and had to put additional monies, time and effort towards re-marketing and re-renovating the space for a new tenant.

The tenant did not actively pursue the licences and permits required to operate the restaurant after May 1, 2019. The tenant also did not notify the landlord of its intention to terminate the lease if the renovations were not completed by May 24, 2019. The tenant did not even attempt to discuss a rent reduction, even though the lease expressly provided that any delay in renovations would be dealt with by way of a possible rent reduction; not termination.

The Court found that the tenant wanted out of the lease and had decided well beforehand to terminate if the renovations were not complete as of May 24, 2019. As such, the tenant failed in its duty to perform its obligations under the lease in good faith. North Star has not come to Court with "clean hands", which is a pre-requisite to obtaining equitable relief.

Accordingly, the Court dismissed the tenant's claim set out in the Notice of Claim in its entirety.

4. Is the landlord entitled to damages for North Star's repudiation of the Lease?

The landlord counterclaimed for building materials, labour, and lost rent. In this case, citing the landlord's contractual damages test from *Highway Properties Ltd. v. Kelly, Douglas & Co*., 1971 CanLII 123 (SCC), the Court found the landlord had accepted the tenant's repudiation and re-let the property to a new tenant. Under *Highway Properties*, this precludes the landlord seeking contractual damages where they mitigate successfully.

The landlord had "not adduced one document" in support of the counterclaim and little oral evidence quantifying the loss. The Court concluded that landlord failed to prove on a balance of probabilities:

a) How much the landlord spent on labour, materials and kitchen equipment for the benefit of North Star;
b) When the landlord accepted the tenant's termination of the lease and whether rent was payable before that acceptance;
c) How much the landlord invested into renovations for the benefit of the tenant prior to termination of the lease;
d) The value of the renovations "thrown away" as a result of the tenant's termination of the lease, specifically, how much of the landlord's investment into renovations did not benefit the new tenant and had to be undone or re-done; and
e) Whether the landlord suffered any loss as a result of the tenant repudiating the lease after the landlord had mitigated its damages.

Held

Both the claim and counterclaim were dismissed, and each party was to bear their own costs.

1200144 Alberta Ltd v Land's Happy Mart Ltd, 2020 ABQB 171

Facts

The landlord operated a shopping mall that it leased to the tenant over a period of 37 years. The tenant operated a gas bar on the premises and as part of that operation it installed underground fuel storage tanks. When the environmental authorities required the landlord to remove the tanks in 2016, the landlord found that the soil was contaminated with hydrocarbons such that it required remediation. The landlord claimed the remediation cost against the tenant.

The tenant had installed fibreglass tanks to replace the old steel tanks in 1989. The issue of ownership of these tanks was disputed between the parties before the lease was terminated in 2014.

Issues

1. Who owned the fibreglass tanks under the 1977 lease?
2. Did the 2004 and 2009 revised leases change the character and ownership of the tanks?
3. Did the landlord's conduct in 2014 change the character and ownership of the tanks?
4. Who was responsible for soil contamination?

Held

1. Who owned the fibreglass tanks under the 1977 lease?

The original steel tanks in the ground when the tenant assumed the lease in 1977 were either fixtures or had been abandoned by the previous tenant and lost any chattel status they may have had (citing an possible line of analysis following *GRJ Holdings Ltd. v GBM Trailer Service*, 2017 ABQB 731. They were buried underground and clearly affixed. In any event, by the time the tenant took over, they were fixtures. This precluded any argument by the tenant that the fibreglass tanks were substituted for the steel tanks.

The original 1977 allowed the tenant to remove "trade fixtures" and allowed the landlord to require removal of same. The term was not defined. On this basis, the Court held that the fibreglass tanks were trade fixtures. They were not attached to "improve" the land but rather to allow the tenant to carry its business. They supplied gas used in the tenant's business, were not strapped down to the land, and could be removed without significant damage to the freehold,

The other gas bar equipment (pumps, canopy, store) were held to be fixtures by the time the tenant took over the lease in 1977, either by their own character or by virtue of abandonment by the previous tenant.

2. Did the 2004 and 2009 revised leases change the character and ownership of the tanks?

The Court held that nothing in either lease suggested that the legal character of the tanks was changed or that they changed hands from the tenant. They remained trade fixtures, a term

contemplated by both leases.

3. Did the landlord's conduct in 2014 change the character and ownership of the tanks?

When the parties were contemplating renewal of the lease in 2014, the issues of the tanks and potential environmental remediation was a sticking point, ultimately resulting in non-renewal. The landlord then did not send the tenant a request to pay the costs of remediation until January 2014. The lease contained a provision that such requests had to be sent within a reasonable time. The Court held that this was not unreasonable, noting that even though the lease had expired, the lease did not specify any timeframe, and this was an essentially an exercise of contractual discretion which should be respected.

Under this same heading, the tenant argued that the landlord was estopped from seeking compensation because the landlord participated in efforts to find a substitute tenant to take over the lease in 2014. The Court decided the issue on the basis that the tenant did not detrimentally rely on any aspect of the landlord's behaviour, and so estoppel or waiver could not be found.

4. Who was responsible for soil contamination?

The first issue was causation, whether the soil leak had occurred during or before the tenants occupancy period. However, on the balance of probabilities and in the face of no evidence about the age of the contamination, the Court held the leak occurred during the term of the lease.

Responsibility for environmental contamination was assumed by the tenant, under the 2004 lease, and in particular the remediation indemnification provision applied retroactively to 1977 when the lease first began. While on the 2009 renewal there was no such retroactivity provision, viva voce evidence revealed the tenant understood that it was responsible for clean up costs at the time. During an issue about financing from a bank, the bank's concerns about environmental damage were assuaged partially on the strength of the tenant's assumption of costs. Both parties were aware, in 2009, that it was possible the land had been contaminated prior to that date, but no steps were taken to confirm that. Even without an explicit retroactivity provision, the Court held the tenant must have intended its remediation obligation in the 2009 lease to include spills even if they were caused by the pre-1989 steel tanks, or else it would have insisted on some environmental testing at the time of renewal.

Consequently, the tenant was responsible for remediation.

Conclusion

The tenant was the owner of the fibreglass tanks and responsible for the remediation costs on the property.

Cherry Lane Shopping Centre Holdings Ltd. v Hudson's Bay Company ULC Compagnie De La Baie D'Hudson Sri, 2021 BCSC 1178

Facts:

The Defendant was a commercial landlord, Cherry Lane Shopping Centre Holdings Ltd. (the "**Landlord**"), who leased out space in its mall to the plaintiff tenant, Hudson's Bay Company ULC Compagnie De La Baie D'Hudson Sri (the "**Tenant**"), which operated a department store. The dispute arose in relation to the COVID-19 pandemic. At the outset of the COVID-19 pandemic in March 2020, the Tenant's store was forced to close for approximately two months. The Tenant's store did not pay rent agreed upon under the lease in April 2020. The Landlord demanded rent, to which the Tenant claimed it could not pay due to financial effects of the pandemic. The Tenant then continued to refuse monthly demands by the Landlord for payment of rent. In September 2020, the Tenant claimed the Landlord was in default of the lease for failing to provide a high-quality premises. Accordingly, the Tenant requested abatement of rent. The Landlord responded by issuing a notice to terminate the lease. The Landlord claimed the Tenant was in wrongful possession of the premises, and the Landlord commenced a petition against the Tenant. The parties reached an interim consent order for rent. The Landlord claimed the Court should be capable of determining the matter on the existing facts, whereas the Tenant claimed a full trial was necessary to determine outstanding issues. The Tenant applied for relief from forfeiture, while the Landlord applied for termination of the lease. The application to terminate was dismissed, and the application for relief from forfeiture was granted

Issues:

1. *Should the petition be converted to a trial.*

2. *Was the Landlord entitled to the petition relief requested.*

3. *If the Landlord was entitled to a writ of possession, should relief from forfeiture be granted and on what terms.*

4. *Is the Tenant entitled to an injunction and on what terms.*

Held:

The Landlord submitted per the terms of the lease, and the provision of the *Commercial Tenancy Act*, RSBC 1996, c 57 (the "CTA"), it was entitled to terminate the lease and to a writ of possession. The basis of these submissions was the failure by the Tenant to pay rent when due, that notices to this effect were provided to the Tenant, and that the Tenant failed to remedy its defaults within 30 days. Conversely, the Tenant relied on a notice of civil claim and injunction application as the basis for its submissions. According to the Tenant, the Landlord's petition was part of a much broader dispute, and the issues should be resolved through a full trial. The Tenant further submitted serious questions existed regarding whether the Landlord was in breach of its lease obligations to provide a high-quality shopping centre and concerning the interpretation of various clauses under the lease. The Tenant further submitted it would be irreparably harmed if an injunction was not granted. In addition, the Tenant also submitted it was entitled to relief from forfeiture, considering

the unprecedented circumstances imposed by the COVID-19 pandemic in light of the long-standing relationship between the parties.

1. *Should the petition be converted to a trial.*

The Court summarized its position by stating, in essence, if the defendant was bound to lose, the application should be granted, but if they are not bound to lose, the application should be dismissed. With respect to this matter, the Court found it was able to determine the necessary facts to decide the petition, and converting the matter to a full trial was unnecessary. The Court noted, whether the Landlord itself was in breach of the lease posed no bearing on the Tenant's obligation to pay rent, and additionally the interpretation issues raised by the Tenant were not particularly complex, and the clauses in question were found to be clear and unambiguous. Accordingly, the petition was not converted to a trial.

2. *Is the Landlord entitled to the petition relief requested.*

The Landlord brought its petition under sections 18 – 21 of the CTA, which provided for the ability to make an application before the Court for determination that a tenant complained of wrongfully holds possession and that the landlord is entitled to possession (section 18); the Court to appoint a time and place to inquire and determine whether a tenant holds possession against the right of the landlord and whether the tenant has wrongfully refused to go out of possession, having no right to continue possession (section 19); a requirement the landlord provide the tenant notice of the time and place so appointed under section 19 (section 20); and the ability for the Court, following the hearing described under section 19, to issue a writ of possession to the sheriff, commanding them to place the landlord in possession of the premises in question (section 21).

According to the Court, this regime sets out a two-stage process for a landlord to obtain a writ of possession. The first stage is an inquiry to determine whether "it appears" the tenant wrongfully holds the premises, and that the landlord is entitled to possession. In the first stage, the landlord must make out a *prima facie* case it is entitled to possession. Once the first stage is determined, the second stage hearing is held pursuant to section 21. According to the Court, during the second stage hearing the onus rests on the tenant to show cause why it is still entitled to remain in possession.

In this case, the Court noted the January 5, 2021 consent order declared the first stage of the two step process as having been satisfied, and the Court took this to mean the Landlord established a *prima facie* case pursuant to section 19. Accordingly, the Court noted the hearing which was the subject of this decision was the second stage of the proceeding, and as such the onus rested on the Tenant to show cause to why the Landlord should not be granted a writ of possession.

The Tenant's defence for its failure to pay rent was an alleged breach of the lease by the Landlord. The Tenant alleged the Landlord failed to provide and operate a "high quality" shopping centre as required by clause 7 under the lease. While both the Tenant and Landlord provided expert evidence regarding whether the shopping centre was a "high quality" one, the Court did not review that evidence in any detail, stating it did not matter whether the Landlord was in breach of its contractual obligation.

With respect to the Tenant's rent obligations in the face of alleged breaches by the Landlord, the Court accepted the authorities provided by the Landlord on this question, specifically *Canadian Pacific Hotels Corp. v. Van Raniga Jewelers and Designers Inc*., 1995 CanLII 3241 ("*Canadian Pacific Hotels*"); and *Malva Enterprises Inc. v. Frum Development Group*, [1992] O.J. No. 2826 (O.N.C.J.) ("*Malva Enterprises*"). In *Canadian Pacific Hotels*, the Court held that after a tenant has gone into possession their obligation to pay rent does not depend upon the performance by the lessor of any contractual obligations, and that "nothing short of something done by the landlord which amounts to an eviction of the tenant will discharge the latter from their obligation to pay rent". Providing further clarity, in *Malva Enterprises* the Court held the common law is unequivocal that the payment of rent is not suspended by a breach of covenant on the part of the landlord unless such breach amounts to an eviction at law.

On the basis of these authorities, the Court held the Tenant would be liable for payment of rent to the Landlord, unless some provision under the lease relieved it of its obligation in the circumstances. Contrary to the submissions of the Tenant, the Landlord claimed the "unavoidable delay" clause (discussed below) had no application to this dispute, and further that clause 4.02 under the lease specifically provided that rent was payable without abatement, set off or deduction. In this case, the Court agreed with the submissions of the Landlord.

The Court noted where the language of the lease is not ambiguous, the words are presumed to reflect the intentions of the parties and extrinsic evidence to explain the meaning of an unambiguous term would not be not admissible.

The Court did not find complicated issues of contractual interpretation to be raised by the issues in this matter. The Court found the relevant provisions of the lease were clauses 4.02 (Rent), 24 (remedies upon default) and 25 (unavoidable delay), and that the meaning of those clauses was clear and unambiguous. The Court noted no existence of any clause in the lease contemplating abatement, set-off, or deduction in the circumstances of this case.

Clause 25 of the lease provided for the suspension of certain obligations during "unavoidable delay". The Court found the wording in clause 25, "whenever in this lease it is provided that any act or things to be done or performed is subject to unavoidable delay", expressly limited the application of clause 25 to those parts of the lease expressly stating they are subject to unavoidable delay. The Court expressly noted clause 4.02, the source of the Tenant's obligation to pay rent, was not subject to unavoidable delay. Likewise, clause 24 which required the Tenant to remedy default within 30 days was not subject to unavoidable delay either. On this basis, the Court held regardless of whether the COVID-19 pandemic was an event constituting "unavoidable delay", the Tenant's obligation to pay rent was not suspended.

The Court held that the Tenant failed to discharge its onus of showing cause that the Landlord should not be granted its writ of possession. The Tenant was under a continuing obligation to pay rent and failed to do so. Accordingly, subject to the Tenant's claim of relief from forfeiture, the Court held the Landlord would be entitled to a declaration that the lease was terminated and the Tenant wrongfully held possession. The Court further clarified its reasoning, by noting both parties in this case were large sophisticated commercial entities, with access to resources such as legal

expertise in entering agreements such as this, and on this basis "there is nothing unjust or inequitable in holding the parties, particularly [the Tenant] to the bargain that was made."

3. *If the Landlord is entitled to a writ of possession, should relief from forfeiture be granted and on what terms?*

The Tenant submitted that relief from forfeiture should be granted, and that it should be granted on the terms that it be permitted to continue paying 50% of the rent to the Landlord and deposit the remaining 50% into its solicitor's trust account.

The Court noted its ability to grant relief from forfeiture is entirely discretionary, and that the factors to be considered by the Court in making its determination are the conduct of the applicant, gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breaches.

The Landlord's claimed relief from forfeiture should not be granted because the Tenant deliberately failed to pay rent, and on that basis the Tenant did not make its application with clean hands. While the Court accepted the Tenant deliberately failed to pay rent for a period and noted this as a factor militating against relief from forfeiture, the Court held failure to pay rent is not determinative of the matter.

In this case, the Court was ultimately satisfied in the circumstances that it was appropriate to grant relief from forfeiture in favour of the Tenant. The basis for this decision was summarized by the Court under paragraphs 76 and 77 of this decision as follows:

> Notwithstanding that HBC deliberately chose to not pay rent, I am satisfied that this is an appropriate case to grant relief from forfeiture. A significant factor leading to this conclusion is that the sum to be forfeited is out of all proportion to the loss suffered. HBC has leased the Premises since 1996, a period of almost 25 years. It undoubtedly has a substantial investment in the Premises. Moreover, the evidence before me is that there are no other premises in the area where the HBC store can be located. Accordingly, if forfeiture is granted, HBC would not only lose its lease and its investment in the Premises, but would not be able to relocate the store. In contrast, the loss suffered by Cherry Lane is not large. It has not suffered the loss of a full year's rent, as it submits. Rather, it has been paid 50% of the rent and is fully secured for the remaining 50% of the rent. Cherry Lane's loss is only the time value of delayed payments.
>
> A further significant factor in my decision is the Covid-19 pandemic. The pandemic is, as HBC submits, unprecedented and has inflicted devastating economic losses on many, including HBC. It is the pandemic that is the root cause of the current dispute. In the circumstances, the court must attempt to ameliorate the consequences of the pandemic, where it can do so with equity and fairness [emphasis added].

With respect to the terms on which relief from forfeiture was granted, the Court did not accept that relief from forfeiture must always be granted on terms that outstanding rent be paid, noting such a

position would be an unreasonable limitation on the exercise of the Court's equitable discretion.[1] In this case, however, the Court held relief from forfeiture should be granted on the condition that all outstanding and ongoing rent be paid to the Landlord. According to the Court, allowing the Tenant to continue paying rent with 50% being paid into its solicitors trust account would effectively amount to rewriting the terms of the lease, and would not be appropriate. The Court noted the Tenant was a sophisticated commercial entity, which entered the lease voluntarily, including the terms to pay rent even if a force majeure or unavoidable delay event occurred, and that "there is nothing inequitable in requiring a party to comply with its contractual obligations freely entered into."

The Court also made an intriguing reference to the COVID-19 pandemic in granting the Tenant's relief from forfeiture. The Court stated "in the circumstances, the court must attempt to ameliorate the consequences of the pandemic, where it can do so with equity and fairness". While more guidance is required from the courts to truly appreciate to what extent the COVID-19 pandemic can be used to secure a relief from forfeiture due to failure to pay rent, the wording here provides a potential opening that the pandemic may be claimed as a basis to secure such relief from the courts.

4. Is HBC entitled to an injunction and on what terms?

The Tenant applied for an injunction prohibiting the Landlord from terminating the lease and re-entering the premises. The test for determining if an injunction is appropriate was set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311 (S.C.C.), as follows:

1. Is there a serious question to be tried?

2. Has the applicant demonstrated that irreparable harm will result if the injunction is not granted?

3. Does the balance of convenience favour the granting of the injunction?

The threshold for a "serious question to be tried" is a low one. A court must simply be satisfied the issues being raised are not frivolous or vexatious. The Court in this case was satisfied that the threshold for a serious question to be tried is met in this case, regarding whether the Landlord itself was in breach of the lease. In this case, the Court was similarly satisfied the Tenant would suffer irreparable harm if it was forced out of the premises, specifically noting the lack of alternative premises in the area and the irreparable reputational damage it would suffer. Likewise, for similar reasons, the Court held the balance of convenience favored granting the injunction.

[1] It is worth noting that the Ontario Court of Appeal took issue with some of the Court's approach, holding that ordering rent abatements as a term of relief from forfeiture is inappropriate, However, it did broadly endorse COVID-19 as a factor in setting terms, see *Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI v. Oxford Properties Retail Holdings II Inc.*, 2022 ONCA 585 at paras 52 – 53.

713949 Ontario Ltd. v Hudson's Bay Co ULC [2021] OJ No. 819, 2021 ONSC 1103 Ontario Superior Court of Justice, February 16, 2021, SF Dunphy J

The landlord leased premises in a shopping centre to a department store tenant. The lease contained a clause in respect of a merchandising plan, which provided that unless the landlord had the written consent of the tenant, it would not lease any space or location in the shopping centre other than for a type and class of use as designated for that space or location on the merchandising plan. The merchandising plan clause also allowed an exception for the landlord to make changes without the tenant's consent where the changes would not represent a major change to the merchandising balance of the shopping centre and would not materially change the pedestrian flow of the shopping centre and detrimentally affect the tenant's merchandising environment.

An issue with the merchandising plan arose with respect to vacant space in the shopping centre which had previously been leased to a Sears department store. The landlord had been trying to re-lease the former Sears space since Sears' departure in January 2018. The landlord made efforts to secure interest from another department store tenant, but was unable to do so. It then looked at options to redevelop the Sears space into several smaller retail tenants on the lower floor and office use tenants on the upper floor, but the COVID-19 pandemic prevented prospective tenants from moving forward.

In the summer of 2020, the landlord received interest from a bank to lease the former Sears premises. Around this same time, the landlord and tenant were involved in an ongoing dispute with respect to the tenant's rent obligations at other locations. During the course of these discussions, in late December 2020, the landlord wrote to the tenant and advised that was about to enter into the lease with the bank for the former sears space and requested the Tenant sign back its lack of objection to the proposed lease. A conditional lease was eventually executed in January 2021.

The tenant took the position that the proposed lease was inconsistent with the merchandising plan and advised that it did not consent to the proposed lease.

On the application, the landlord took the position that the tenant's consent was not required as the proposed lease did not represent a major change to the merchandising plan, did not materially change the pedestrian flow in the shopping centre or detrimentally affect the merchandising environment in the shopping centre. It argued that since the Sears space had been vacant since January 2018, the proposed lease could not be said to detrimentally affect the merchandising environment for the shopping centre and in fact, would enhance the merchandising environment as compared to the vacancy.

The Court disagreed with the landlord and held that proposed lease constituted a major change to the merchandising plan of the shopping centre, would affect the pedestrian flow of traffic with the additional office workers of the proposed new tenant, and, would detrimentally affect the merchandising environment of the shopping centre, even though the sears space was currently vacant and had been vacant for three years. The Court held that the vacancy was not permanent or unchangeable and therefore was not the appropriate basis for an assessment of whether the merchandising environment had been negatively affected.

The Court also considered whether or not the tenant's refusal to consent was unreasonable in the circumstances. The landlord argued that the proposed lease was in the tenant's best interest considering the lengthy vacancy. It further argued that the tenant's reasoning for its refusal was speculative and motivated by an improper attempt to secure a collateral benefit. It also took the position that the tenant was acting in bad faith as there was an ongoing rent dispute between the parties.

The Court disagreed with the landlord for a number of reasons. It held that in considering whether or not the tenant's refusal is unreasonable, the Court was required to consider the information available to the tenant and whether a reasonable person would have refused to consent in those circumstances. It found that the landlord had not provided enough information about the proposed lease and had provided only a short period of time for the Tenant to consent to the proposed lease. As such, it held that the tenant's refusal was reasonable.

With respect to the landlord's other arguments and the question of whether the tenant was acting in bad faith, the Court held that the tenant's rights with respect to the merchandising plan were completely independent of the question of arrears of rent and that the landlord's obligations with respect to the merchandising plan were not suspended by any non-payment of rent. On that basis, the Court found that the tenant was not acting in bad faith and that its refusal to consent was reasonable.

977230 Alberta Ltd v Boire, 2019 BCSC 66

Facts:

The Landlord owned Lot 4, an undivided parcel of lands, located in the Regional District of East Kootenays. The Landlord developed a real estate project on Lot 4 which included an RV park which contained approximately 148 sites located in Lot 4. Lot 4 had no subdivision plans in place.

In 2011, the Landlord granted mortgages to 977230 Alberta Ltd. (the "**Mortgagee**") which were registered against the title to Lot 4. In 2013, the District enacted a bylaw requiring a permit to operate a campground, and no permit was granted to operate a campground on Lot 4.

In January 2014, the Mortgagee commenced foreclosure proceedings against the Landlord. An order absolute was granted for the Mortgagee on April 21, 2016 and filed in the Land Title Office on September 21, 2016, which made the Mortgagee the sole legal and beneficial owner of Lot 4.

After foreclosure proceedings were commenced, the Landlord purported to grant leases (the "**Leases**") to the Respondents (the "**Tenants**") who occupied the Premises for recreational purposes. The Leases were for a fixed term of 50 years for specific site numbers within the RV Park, and granted the Tenants the right to "install equipment, fixtures, and improvements to their properties" (at para 14). Further, the Leases were to be registered on the title by the Landlord for the benefit of the Tenants; however, none of the Leases were filed in the Land Title Office against the Lot 4 title. Despite the Leases, the Court noted that the *Land Title Act* precluded the Landlord from transferring title to any of the RV Park since there was no subdivision plan in place.

After the Leases were signed, the Tenants began occupying and developing the properties in 2011 and 2012 in accordance with the Leases, including the construction of:

- permanent living accommodation structures;
- decks and patios;
- detached buildings;
- underground and above ground water tanks and sewage tanks; and
- stairways and fences.

The Mortgagee argued that the Tenants' occupation and construction on the RV Park was without the Mortgagee's knowledge or consent. The Tenants argued that, as early as 2012, the owner and president of the Mortgagee had knowledge of how many Tenants had purchased property, the developments that had been undertaken, or the Tenants' use and enjoyment of the RV Park.

The Tenants paid no rent for the use of the RV Park, and no sewer, water, power, or fire services were being provided or were available for the RV Park.

On March 28, 2017, the Mortgagee sent an email to the District proposing a plan for the Tenants to remain in the RV Park while Lot 4 was brought into compliance with the applicable bylaws. On April 11, 2017, the District informed the Landlord that the Tenants could not remain in the RV Park in contravention of the Bylaws, which was consistent with their message to the previous owner.

On May 16, 2017, the Mortgagee received a letter from the District stating that Lot 4 was in violation of the District's bylaws, and stated that a failure to remedy the bylaw infractions by July 1, 2017 could draw sanction. The Mortgagee filed a petition under the *Manufactured Home Park Tenancy Act*, SBC 2002, c. 77 to have the Tenants removed from the property.

On May 9, 2018, the Tenants applied to convert the Petition into an action, which was dismissed on May 31, 2018 by the British Columbia Supreme Court (2018 BCSC 927) on the basis that:

- there were insufficient facts to create a triable issue of equitable fraud, and there was nothing to suggest that the Mortgagee acted outside the normal course of business or violated any principle of common morality;
- there was no triable issue under s. 73.1 of the *Land Title Act* as there was no assertion that the Mortgagee was a landlord and would not have obligations as such. Section 73.1 of the *LTA* did not give a lessee *in rem* rights in the land or any equity of redemption.
- There was no triable issue of estoppel as there was no evidence of detrimental reliance

Thus, the Court determined that the Leases were unregistered long-term leases of unsubdivided land and contrary to section 73 of the *LTA*. As such, citing International Paper Industries Ltd. v. Top Line Industries Inc. (1996), 20 B.C.L.R. (3d) 41 (C.A.), the Court determined that the Leases were void *ab initio* and could not create any interest in land.

Issues:

1. Does the MHPTA apply to the properties at issue?
2. If so, what remedies should be granted?
3. Is the evidence of Mr. Hockett's knowledge relevant to the MHPTA issues to be determined?

Held:

1. Does the MHPTA apply to the properties at issue?

The Tenants maintained that the MHPTA applied such that, upon foreclosure of the Premises, the Landlord took the land subject to the existing tenancies.

The question of whether the MHPTA applied depended on whether the Tenants' structures met the definition of a manufactured home in section 1:

> "manufactured home" means a structure, other than a float home, whether or not ordinarily equipped with wheels, that is
>
> (a) designed, constructed or manufactured to be moved from one place to another by being towed or carried, and
>
> (b) used or intended to be used as living accommodation;

The Court determined that the issue of whether the MHPTA applied depended on whether the Tenants' structures met the definition of "manufactured home" in the MHPTA, which required a structure be "used or intended to be used as living accommodation." The Court considered *Steeves v. Oak Bay Marina Ltd.,* 2008 BCSC 1371, followed in *Lang v. British Columbia (Residential Tenancy Act, Dispute Resolution Officers),* 2008 BCSC 1707 at para 21, which defined "living accommodation" as a "permanent primary residence" (at para 41).

The Tenants provided no evidence to establish that they used or intended to use their accommodation as a permanent primary residence. The Court noted the following findings of fact:

- Some of the Tenants admitted they lived or resided in Alberta;
- One Tenant intended on using the RV Park as a place to use their RV; and
- One Tenant was looking for a place to spend time following retirement.

As the use of the Premises did not meet the definition of living accommodation, the Court determined that the MHPTA did not apply.

2. *If so, what remedies should be granted?*

The Leases were contrary to the *Land Titles Act* and the Tenants had no *in rem* rights under section 9 of the MHPTA that could be enforced against the Landlord. As a result, the Leases were unenforceable against the Mortgagee, and the Tenants had no rights or interest against the Mortgagee.

3. *Is the evidence of the Landlord's president's knowledge relevant to the MHPTA issues to be determined?*

The Court ruled that his knowledge of the Tenants' actions was irrelevant to the issues. As such, no further consideration was given to the issue.

Conclusion:

The MHPTA did not apply and the Leases were unenforceable against the Mortgagee. The Tenants were ordered to vacate the lot in compliance with the District Order. The Court granted a stay of its order for six months to allow the Tenants to remove their structures from the RV Park and the Mortgagee was directed to allow the Tenants to do so by removing any barricades impeding access to Lot 4 at the Mortgagee's expense.

Costs were awarded for the Mortgagee against the Tenants on scale B.

0976820 B.C. Ltd. v Dorset Realty Group Canada Ltd., 2022 BCSC 988

Facts:

The Tenant operated a pet store in Richmond, BC. The lease included an "additional rent" clause that covered estimated operational costs. The Tenant claimed that the Landlord and the leasing agent had misrepresented these operating costs to them, and that the Landlord had also misrepresented that certain anchor tenants would be present in the shopping centre to draw in business. The Tenant brought an action for negligent misrepresentation.

Issues:

1. *Did the Landlord or Dorset make misrepresentations to the Tenants regarding estimated operating costs and property taxes?*

Held:

1. *Did the Landlord or Dorset make misrepresentations to the Tenants regarding estimated operating costs and property taxes?*

The Tenants claimed against the leasing agents for negligent misrepresentation. This required demonstrating a duty of care owed by the agents to the Tenant, that the duty of care was breached, and that the Tenant relied on that misrepresentation to its detriment.

Sometime in July 2013, the Tenants viewed an online advertisement (the "**Advertisement**") for the Premises, which provided the space was 5,812 square feet and that the estimated additional rent for 2014 was $12.71 per square foot, or $6,155.88 per month. The Tenants understood at the time that these figures were merely an estimate that may be subject to adjustments by the Landlord in the future. On July 16, 2013, the Tenants met with the Landlord and leasing agent to view the property. During this viewing, the Tenants never inquired about Additional Rent, property tax, common area fees, or any of the Landlord's terms in leases with the other tenants. At a second viewing, the Tenants again failed to inquire further.

The Tenant submitted an offer to lease and the parties commenced negotiations. The Landlord insisted payment of Additional Rent commence in December 2013, and the Tenants relented to this demand. The Court noted throughout these negotiations, and specifically the attempts to negotiate the date Additional Rent was due, no questions were asked by the Tenants with respect to topics like Additional Rent, property taxes, common area fees, or the lease terms between the Landlord and its other tenants.

The Tenants' representative stated that she had not read the lease prior to advising her clients to sign it, only reading the email to which the leased was attached. The Landlord and leasing agent did not deny the Tenants the opportunity to obtain legal advice before executing the lease, only that they would not grant access to the Premises until the lease was signed. The Tenants signed the lease without receiving legal advice prior to execution.

Shortly after signing, the Tenants requested they be permitted to defer their Additional Rent payment for 13 months. The Landlord denied this request. The Tenant testified that she did not understand it would be required to pay additional rent based on an annual estimate of operating costs and property tax, despite that being clearly stated in the lease. However, the Tenant had not relayed any confusion or concern to the Landlord at the time of signing.

The Court found the Plaintiff's claim of misrepresentation could not be made out in the face of evidence that she had every opportunity to negotiate, read, and understand the final offer. It was her choice not to seek legal advice or even read the lease. The Court found that she was in a rush to move into the premises and, in her haste, failed to perform due diligence. The Landlord and leasing agent were entitled to assume that she had read and understood the lease, and that she had either obtained or waived legal advice. They had no duty to explain it further.

Concerning the anchor tenants, an advertisement posted by the leasing agent leaned partly on the fact that two large stores were present in the mall to draw foot traffic. In fact, those tenants were not planning to renew their leases, which expired shortly after the Tenant assumed possession. The Tenant's business struggled, which she blamed partly on the loss of the anchor tenants.

The Court found there was no evidence the Landlord or leasing agent knew of the anchor tenants' plans to leave. The Court accepted that it was not uncommon for renewal discussions to be unsettled some months ahead of the expiry of the lease, and the fact that those tenants had not yet confirmed renewal was not enough to say that the Landlord to know that they would not renew by the expiry date.

In any event, on the date the advertisement was posted those anchor tenants were in fact present in the shopping centre, so no misrepresentation was made.

Finally, the Tenant argued that the leasing agent owed it a fiduciary duty arising out of the payment of management fees under the lease. This claim was defeated for a number of reasons. First, it was not pled (the Tenant was represented by her "agent" rather than counsel). Second, no authority was provided to support this duty. Third, the Tenant and commercial agent were commercially interested parties, and fiduciary duties between such parties are rare. The Tenant's agent had represented himself as commercially sophisticated, and there was no unequal bargaining power. The fiduciary duty claim failed.

In any event, the terms of the lease were described to the Tenant by the Landlord. The leasing agent was not directly involved until after the lease was signed, so it could not have misrepresented the lease.

Conclusion:

The Tenant's claim was dismissed. Any misapprehension she had about the lease was caused by her own failure to review it, not by any statements made by the Landlord.

Fehr v Purple Geranium Services Society, 2021 BCSC 1929

Facts

The petitioner landlord was an owner of a commercial premises leased by the respondent tenant to provide addiction recovery services to young adult at-risk women. The lease began in February 2012 for a two-year term and renewed annually unless terminated by the landlord. The lease also contained a buy-out clause which gave the tenant an ability to purchase the premises at any time after execution of the lease. The landlord indicated an intention to sell the premises in June 2020. In May 2020, the landlord inspected the premises and learned that the tenant had stopped using the premises as a recovery house for at-risk young women and had transitioned into operating a senior's living facility. The landlord advised the tenant that there was breach of lease and that the lease would not be renewed. The landlord issued a notice of default and non-renewal to the tenant that purported to terminate the lease at the end of January 2021. In October 2020, the tenant provided the landlord with an offer to purchase the premises for $397,440 and the landlord rejected the offer. The tenant commenced a claim for specific performance and registered a certificate of pending litigation against the property. The landlord brought an application for inquiry under the *Commercial Tenancy Act*.

Issues

1. Has the landlord established a triable issue, which if proven at the next stage of the *Commercial Tenancy Act* process would entitle the landlord to a writ of possession?

Held

1. Has the landlord established a triable issue, which if proven at the next stage of the *Commercial Tenancy Act* process would entitle the landlord to a writ of possession?

The tenant submitted that its counsel formally exercised the buy-out option by delivering written notice of the tenant’s intention to purchase the premises. It argued that the use of the premises as a senior's living facility is not prohibited by the lease, and the landlord was in breach of the lease by refusing the respondent the opportunity to exercise its right pursuant to the buy-out option. Therefore, the petitioner had failed to show a *prima facie* breach of the lease.

The Court found that the petitioner landlord had raised a triable issue. The landlord disclosed in his affidavit evidence regarding the terms of the lease, the instrument creating or containing the lease, albeit a copy that is not executed, his demand for delivering possession and the refusal of the tenant to go out of possession and the reasons given for the refusal. The landlord disclosed the tenant's reasons for refusing to vacate and that they involve allegations that the landlord breached the lease by refusing to accept the contractual buy-out payment, and by unilaterally altering the buy-out payment to $500,000.

The landlord raised a triable issue as to the legality of the tenant remaining in the premises. The Court held that, weighing the evidence for the limited purpose of the first stage of the procedure,

such a triable issue has been raised. The Court was satisfied that the requirements of s. 18 of the *Commercial Tenancy Act* , which must be strictly complied with, have been met.

Conclusion

The application was granted. The landlord disclosed evidence in the affidavit regarding terms of the lease, the instrument creating or containing lease, demand for delivering possession, refusal of the tenant to go out of possession, and reasons given for refusal. The legal rights of the parties were not resolved at the interlocutory first stage of the procedure under s.19 of the *Commercial Tenancy Act*. Thus, questions of whether the tenant's alleged equitable interest in property established that the tenant had the right to continue in possession was not a matter for determination at this first stage. The matter was to proceed to inquiry as contemplated by s. 19 of the *Act.*

1100 Walkers Line Inc. v. Elliott Sports Medicine Clinic Inc., 2021 ONSC 5067

The tenant leased commercial premises from the landlord. The lease between the parties contained a renewal provision which granted the tenant the option of renewing the lease for an additional term of 5 years. The lease stated that the renewal term was to be on the same terms and conditions as the lease, except in respect of rent (which was to be agreed upon by the parties based on market rent).

The renewal provision provided that the tenant must provide written notice exercising its option to renew at least 6 months prior to the expiry of the initial term of the lease, and if it does not provide such notice, the lease was deemed to have automatically renewed.

The tenant did not exercise its option to renew and vacated the premises upon expiry of the initial term. The landlord sought summary judgement against the tenant for vacating the premises.

The tenant argued that the lease ended without renewal in October 2020. The tenant claimed that there were discussions between the parties about the renewal and about whether the tenant would require a reduced amount of space; however, no agreement was reached between the parties. The tenant's position was that such discussions amounted to an amendment by conduct of the lease or constituted an estoppel, preventing the landlord from relying on the automatic renewal clause.

The Court held that the doctrine of estoppel was inapplicable as it required more than just inconclusive discussions. It also found that there was insufficient evidence that the parties amended the lease by their conduct. To amend a written agreement by conduct, the conduct must be "clear and unequivocal" and must be "conduct which somehow definitively indicates that the parties' mutual intentions had changed". The Court found that this was not the case here.

The tenant also argued that since there was no agreement as to the market rent, the renewal clause was unenforceable. The landlord argued that the fact that the renewal clause "stipulates that the rental rate is to be agreed upon by the parties, but that binding arbitration will fix the market rate if they cannot agree, makes the [r]enewal [p]rovision firm and enforceable".

The Court found that the renewal clause was enforceable. It held that "[a] mandatory arbitration clause, which kicks in if there is non-agreement on rent, does create certainty" and the discussions between the parties did not amount to an amendment of the lease. The language of the clause was clear and unambiguous, and the parties had counsel at the time of negotiating the lease. The landlord was entitled to rely on the portion of the provision that stated that if the tenant did not provide notice, the lease was automatically renewed.

The landlord's motion for summary judgement was granted.

Metro Ontario Real Estate Ltd. v. Woodland Park Plaza Inc., [2021] O.J. No. 2963 (Ontario Superior Court of Justice, May 31, 2021, F.L. Myers J.)

The tenant leased premises in a plaza to operate a Food Basics grocery store. The lease provided that the tenant was required to pay its proportionate share of the common area maintenance expenses of the plaza, the amount of which was based on estimates using the prior year's common area expenses. Within 120 days of year-end, the landlord was required to provide a statement of the actual expenses, and the tenant then had 45 days to balance the account if the actual amount differed from the estimated amount. The lease required the landlord to keep and produce backup documents for up to two years for review by the tenant.

For most of the term of the lease, the parties did not follow the process set out in the lease as the landlord did not provide a statement at year-end providing the actual expenses for the year, and the parties did not reconcile that amount against the estimate. The tenant paid its proportionate share based on a "rental advice notice" provided by the landlord.

In 2018, the tenant began demanding that the landlord substantiate the amounts it was charging for common area maintenance expenses, and pending reconciliation, it paid less than the amounts set out in the landlord's notices.

The lease also contained an option to extend the term for a further period of five years, provided that the tenant was not in default and provided that the tenant gave notice exercising its option to extend on or before the date that was 210 days prior to the expiry of the then current term. The tenant exercised its option to extend in accordance with the lease. The lease also provided that if the tenant failed to provide its notice exercising its option to extend, the term would extend on a month-to-month basis, which could be terminated by either party on 30 days' notice. However, if the landlord provided such notice, the tenant would thereafter be entitled to exercise its option to extend and restore the lease.

The landlord asserted that the tenant was in default when it exercised its option to extend for failing to pay its proportionate share of common area maintenance expenses and therefore it was not entitled to extend the term. The tenant paid the remaining amount owing under protest, but the landlord asserted that, at that point, the tenant had missed the period during it which it was required to exercise its option to extend.

The tenant brought an application against the landlord seeking an order for a declaration that it validly exercised its option to extend the lease.

The Court found that the parties deviated from the terms of the lease with respect to the tenant's payment of its proportionate share of common area maintenance expenses and so the landlord could not retroactively claim that the tenant was in default of those provisions without providing any notice to the tenant of the purported default. The Court held on that basis that the tenant was not in default of the lease when it exercised its option to extend. The Court also held that even if it was in default, the tenant cured that default in order to exercise its option. It also found that the provision of the lease permitting the tenant to reinstate its option to extend following the expiry of

the term continued to apply. The Court declared that the tenant was not in default and validly exercised its option to extend.

Subway Franchise Restaurants of Canada Ltd. v. BMO Life Assurance Co., [2020] O.J. No. 256 (Ontario Superior Court of Justice, January 22, 2020, E.M. Morgan J.); [2021] O.J. No. 2812 (Ontario Court of Appeal, May 26, 2021, R.G. Juriansz, G. Huscroft and M. Jamal JJ.A.)

The tenant leased premises for the operation of a Subway restaurant. The lease was to commence on a date to occur following the tenant's fixturing period. The lease provided the tenant with an initial 10-year term and two 5-year options to renew, exercisable with notice at least 9-months, but not more than 12-months, prior to the expiration of the initial term. At some point the tenant occupied the premises and the lease commenced, but no notice of the tenant's occupancy was sent to the original landlord.

Shortly after the commencement of the lease, the original landlord amalgamated with another corporation to form the landlord. Prior to the amalgamation, the original landlord requested that the tenant sign an estoppel certificate which set out the prescient terms of the lease, including that it would expire on August 23, 2018, and there would be two 5-year renewal options. The tenant executed and returned the estoppel certificate.

For an unspecified reason, the tenant's central database provided that the lease was to expire on May 31, 2018. Throughout the term, the tenant made a number of inquiries with the landlord as to when the lease term would expire in order to confirm its internal records, despite having signed the estoppel certificate. The landlord did not answer these inquiries.

Relying on their internal database, on May 19, 2017, the tenant provided the landlord with notice exercising its option to renew the lease. The notice was not provided in accordance with the lease, which required that it be provided between August 24, 2017 and November 23, 2017. Additionally, the notice was sent to a generic mailbox at the landlord's head office and was never received by a member of the landlord's organization in a position to deal with the matter.

On December 21, 2017, the tenant met with the landlord and again asked when the lease would be expiring, to which the landlord advised that the lease term would expire on August 23, 2018. By this time, the window for the tenant to properly exercise its option to renew had already closed.

The tenant brought an application for relief from forfeiture and argued that the landlord did not advise the tenant of the expiry date of the lease intentionally and that this was a breach of the landlord's contractual duty of good faith. The landlord argued that it is not obligated to provide the tenant with dates that are within the tenant's own knowledge and are the tenant's responsibility.

The Court agreed with the landlord and held that the lease puts the obligation of notice with respect to the option to renew on the tenant, not the landlord, and sets out precisely when that notice is to be given. The tenant could, and should, have known and complied with the relevant dates for giving notice of its exercise of its option to renew. The Court concluded that it was not the landlord's responsibility to keep track of the relevant dates and the duty of good faith does not require the landlord to make sure the tenant fulfills its obligations correctly.

Ultimately, the Court held that the tenant missed the date for providing notice of its exercise of its option due to its own failings, and therefore there were not grounds for relief from forfeiture.

The tenant appealed.

The Court of Appeal upheld the Trial Court's finding that there not any grounds for relief from forfeiture and that the Court applied the correct legal principles to the facts, including that the duty of good faith performance of a contract did not apply, as the landlord did not lie, knowingly mislead the tenant or create a false impression through its actions. The Court of Appeal held that the Court rightly determined that the tenant merely failed to make diligent efforts to comply with the terms of the lease and properly deliver the notice to renew.

1890077 Ontario Inc. v 2076748 Ontario Inc., [2021] OJ No 627 (Ontario Superior Court of Justice, January 14, 2021, D.A. Broad J.)

The tenant leased bar and restaurant premises. The tenant and landlord entered into a five-year lease with an option to extend the term for an additional period of five years, subject to certain conditions.

The tenant attempted to exercise its option to extend; however, the landlord took the position that the tenant was not permitted to exercise its option to extend because it was in breach of the lease. The landlord stated that the tenant's operation of its business as a bar did not fall within the permitted use clause stipulated in the lease, which allowed the tenant to use the leased premises only as a restaurant.

The tenant signed an acknowledgement agreement sent by the landlord which asserted, amongst other things, that the tenant did not exercise its option to extend and was not entitled to an extension of the term.

The tenant argued that it entered into the acknowledgement agreement because the landlord promised to assist the tenant in selling its business. The tenant was unsuccessful in selling its business and claimed that the landlord was partially to blame.

The tenant brought a claim against the landlord for damages. The tenant's claim against the landlord was based on the doctrine of promissory estoppel and fraudulent misrepresentation. The tenant alleged that, but for the landlord's representations regarding their aid in the sale of the tenant's business, the tenant would not have entered into the acknowledgement agreement.

The Court refused the tenant's estoppel and fraudulent misrepresentation arguments. The Court noted that Canadian authorities on the doctrine of estoppel often mention a distinction between the use of the doctrine as a defense and its use as the basis of a cause of action. The Court strongly supported the notion that the doctrine of promissory estoppel cannot be used to found an autonomous cause of action in support for a claim for damages. However, it did not make a determinative finding based on that distinction alone, suggesting that such a distinction could be incorrect. The Court further supported its dismissal of the tenant's claim by asserting that the tenant did not demonstrate that the representations or assurances made by the landlord and relied on by the tenant were sufficiently unambiguous.

The Court also pointed to an "entire agreement" clause, which essentially nullifies any representations or assurances made by either party which are not expressly included within the lease, to further support its dismissal of the tenant's claim. The Court determined that the tenant was precluded from relying on representations and assurances made outside of the lease by the "entire agreement" clause.

The Court dismissed the tenant's claim.

Anderson Learning Inc. (c.o.b. Bond International College) v. Birchmount Howden Property Holdings Inc., [2021] OJ No. 4579, 2021 ONSC 5824 Ontario Superior Court of Justice, August 30, 2021, EM Stewart J.

The tenant operates two schools from premises leased from the landlord. The original lease commenced on September 1, 2010 and ran for a period of ten years, unless renewed by the tenant pursuant to its lease option. The option provided for two five-year renewal terms with rent at fair market value as agreed upon or decided by arbitration. The provision required that the tenant provide the landlord with six months written notice in order to exercise its right. The tenant also had the option to match any third party offer the landlord would accept to purchase the property.

In February of 2020 the landlord reached out to the tenant in respect to its renewal. The tenant sent two emails which indicated it was "extending" its lease. These emails also contained discussion of repairs, lease amendments, and the amount of rent. COVID-19 had created operational challenges for the tenant in its operation of the school, and it was behind on rent for some time and negotiated a discount. Eventually the parties came to a signed understanding and the tenant continued operating.

The landlord then entered into a conditional agreement to sell the property. It did not give notice to the tenant of the proposed sale, or give the tenant an opportunity to match the offer. In August 2020, the landlord advised the tenant that a third party had conditionally purchased the property and that it was seeking a new 10-year lease from the tenant. In early 2021, the landlord then attempted to have the tenant execute an estoppel certificate, agreeing that it had only extended its lease by a year until August 2021 and that it had waived its right to match any third party's offer in respect to the sale.

The tenant did not agree to sign the estoppel, and instead commenced an action, seeking injunctive relief and a declaration that the lease had been validly renewed. On a motion for partial summary judgment, the Court considered the issue of whether the tenant had validly renewed the lease. The landlord sought the opposite relief. It argued that the tenant had not properly exercised its option to renew as it had referred to an extension rather than a renewal in its notice and that it had delivered the notice via email rather than registered mail as called for in the lease.

The Court found that the tenant had expressly and unequivocally complied with the notice requirements in respect to the renewal. It further found that the fact that the tenant's correspondence had referred to an "extension" rather than a "renewal" was irrelevant semantics. It also found that surrounding discussion in respect to repairs, rent and lease amendments did not in any way undermine its notice of intention to renew, as these were separate matters.

The Court also adopted the Court of Appeal's reasoning in earlier decisions and found that, although the lease required written notice delivered in person or by registered mail, the email notice provided by the tenant was not less advantageous to the Landlord. It noted that the parties had regularly communicated by email; that the Landlord had invited the tenant's email in respect to the renewal by writing to it about the renewal via email; and that the Landlord had waived its right to insist on strict compliance and estopped itself by not protesting the method of delivery at the

time. The Court also held that even if the tenant's actions were not in strict compliance with the lease, it would otherwise have granted relief from forfeiture. On the above basis the Court held that the tenant had validly renewed the lease. This decision of Justice Stewart was later affirmed by the Ontario Court of Appeal in June 2022.

HAS Novelties Ltd. v. 1508269 Ontario Ltd., [2021] OJ No. 567, 2021 ONSC 642, Ontario Superior Court of Justice, January 26, 2021, J. Steele J.

The tenant and landlord entered into three leases with respect to the three commercial units, each from which the tenant operated a business manufacturing custom promotional products. All three leases contained renewal options and were set to expire on July 31, 2021.

When the COVID-19 pandemic occurred in March 2020, the tenant sought rent relief from the landlord. The parties entered into a temporary rent relief agreement whereby the tenant would pay one third of the regular rent while the COVID-19 related lockdowns were in effect. The parties agreed that the remaining two thirds of the rent would be paid over six months after the lockdown ended. The parties also agreed that the term of the leases would extend past the expiry date for as many months as the COVID-19 related lockdowns occurred.

When the Canadian Emergency Commercial Rent Assistance ("CECRA") program was introduced in April 2020, the tenant asked the landlord to participate in it. However, the landlord advised the tenant that it wanted to wait for further details. Once more details for the CECRA program were available, the tenant again asked the landlord to apply. The landlord made assurances that it would do so, but ultimately decided not to proceed with the application, citing noise complaints it had received from other tenants and an issue with utility bills.

In June and July, 2020, the tenant failed to pay all of the rent due under the rent relief agreement. The landlord subsequently advised that as a result of the tenant's failure to pay the rent, the rent relief agreement was at an end as of August 2020, and that the tenant was required to begin repaying the deferred two thirds of rent. The tenant took the position that the landlord made assurances that it was applying for CECRA and that therefore the landlord was estopped from denying the full rent due under the Lease.

The tenant commenced an application, seeking a declaration, amongst other things, that it was not in breach of its obligation to pay rent under the lease. The landlord commenced a cross application claiming that the tenant had failed to pay the rent due under the rent relief agreement and that it was entitled to treat it as at an end. The landlord further claimed that the tenant was in default of their obligation to pay rent under the leases and accordingly were not entitled to exercise their options to renew.

Although the Court found that the landlord had made assurances to the tenant that it would apply for CECRA, it also held that the landlord was not obligated to participate in the program. The landlord's participation in CECRA was voluntary, the Court held, and despite the fact that the landlord had clearly been considering the program and had even let the tenant that know it was considering applying, this did not mean that the landlord had become obligated to participate. The Court noted that of the two parties, it was the landlord had the most to lose by submitting the CECRA application. As a result, it had the right to refuse to apply.

The Court further held that although the landlord was entitled to treat the rent relief agreement as being at an end, the tenant had, with the exception of one months' rent, paid the arrears of rent as

of the date of the application and was no longer in default of the lease. As the rent relief agreement had extended the time to renew the lease, the Court held that provided that the Tenant cured its default prior to the new renewal date, they would be entitled to renew the leases.

Jaqtoo & Jaqtoo Professional Corp. v. Granfield Homes Holdings Ltd., [2021] OJ No. 6275, 2021 ONSC 7230 Ontario Superior Court of Justice, November 1, 2021, H Leibovich J. and additional reasons at [2021] OJ No. 6276, 2021 ONSC 7355, released November 8, 2021

The tenant, a law firm, had a lease which was set to expire on October 31, 2021. The tenant wanted to renew the lease but the parties could not agree on a new rate for the renewal term. The lease provided that the new rent rate had to be agreed on by the end of September 2021. The tenant filed an application asking the Court to set the new rate for the renewal term of the lease and renew the lease for a three year term, and, for a declaration that the landlord was in breach of its duty to act in good faith.

The landlord opposed the tenant's application on the basis that the Court had no jurisdiction to intervene and set the market rate and that it had acted on good faith. It took the position that the lease was at an end since the parties did not agree on a new renewal rate.

The renewal clause in this case contained the following conditions for the tenant to exercise its option to renew:

1. The tenant was required not to be in default of the lease at any time during the term; and,
2. The tenant had to notify the landlord no less than six months prior to the expiry of the term.

The renewal clause also stated that the basic rent for the renewal term would be based on market rent and that it had to be agreed upon by both landlord and tenant at least one month prior to the expiration of the term, failing which the renewal option would be revoked and the lease would expire at the end of the term.

The Court looked at the renewal clause in the lease and found that the although the tenant was not in default and had provided the notice required under the lease, the addition of a requirement for the parties to agree on a new rent rate at least one month prior to the expiry of the lease term meant that the Court did not have jurisdiction to intervene and instead, the lease came to an end as a result of the parties failing to agree on the new market rent rate.

The Court also noted that the landlord did have a duty to negotiate in good faith, otherwise the market rent would in effect be whatever the landlord decided. However, the Court held that the Landlord did, in fact, negotiate in good faith. In additional reasons released a week after the initial judgment, the Court found that the landlord had engaged in good faith negotiations with the tenant. It had responded to the tenant's concerns, engaged an expert to provide evidence for the market rate and engaged in negotiations with the tenant to such an extent that by the time of the hearing, the parties were only $0.50 per square foot apart in their proposed rent rates. The Court therefore held that the landlord had not acted in bad faith and that parties simply could not agree on a new rate. As such, the Court held that the lease was at an end and dismissed the tenant's application.

RHP Training Centre Inc. v. Ponterio Developments Inc., 2021 ONSC 5805 (Ontario Superior Court of Justice, August 30, 2021, Justice R.D. Gordon)

The tenant leased premises from the landlord for a term expiring on March 31, 2020. The lease contained two options to renew the lease for a further period of five years each, so long as the tenant was not then in material default and had not, during the term, been in continuing default under the lease. In order to renew the lease, the tenant was required to deliver written notice to the landlord not less than six months prior to the expiry of the term.

For several months prior to the expiry of the term, the tenant and the landlord attempted to negotiate a renewal on modified lease terms but failed to come to an agreement. The tenant had not provided formal written notice of its intention to renew. The landlord eventually took the position that any renewal would have to be upon the same terms and conditions as set out in the lease except as to fair market rent (as was stipulated in the renewal option). The landlord informed the tenant of its position in a letter, which also set out the requirements to: (i) provide written notice of the tenant's intention to renew upon the same terms and conditions save for fair market rent; and (ii) pay the rent arrears, if the tenant wished to exercise its renewal option. The landlord provided the tenant six days to comply with the renewal requirements in the letter. Though discussions continued between the landlord and tenant, the tenant did not deliver the written notice nor pay its arrears prior to the deadline set out in the letter. The landlord ultimately took the position that the option to renew was null and void.

The tenant brought an application to determine: (1) whether the tenant required to strictly comply with the notice requirement under the lease, or was substantial compliance sufficient; (2) did the landlord waive compliance with the renewal requirements; and (3) should the tenant be granted relief from forfeiture?

The landlord argued that an option to renew must be strictly complied with by the party exercising the option and such compliance must be clear, explicit and unequivocal. The tenant argued that the landlord had waived strict compliance with the notice requirement based on the negotiations that took place between the parties.

The Court found that the landlord had waived strict compliance with the notice requirement based on the parties' lengthy renewal negotiations and that it was reasonable for the tenant to believe that the landlord would not be relying on its strict legal rights concerning the lease renewal.

However, the Court further found that the landlord was entitled to revoke its waiver so long as it provided reasonable notice to that effect and that such notice made it clear to the tenant that the landlord would be relying upon strict compliance with the renewal provisions in the lease going forward. The Court determined that the landlord had properly revoked its waiver in its letter to the tenant and that the six-day notice period for the tenant to comply with the renewal provisions was reasonable in the circumstances. The Court held that, since the tenant failed to provide notice of its intention to renew or pay its arrears until well after the six-day deadline, the tenant did not have the right to renew the lease.

The Court refused to grant the tenant with relief from forfeiture. Where a party seeks to renew a lease but has not complied with the formal requirements or preconditions for doing so, the tenant must demonstrate that it has made diligent efforts to comply with the terms of the lease and has been unable to do so through no fault of its own. The Court held that once the landlord reinstated strict compliance with the renewal provision, the tenant did nothing to comply with such requirements and therefore relief from forfeiture was not available.

Solid 78 Inc v Gobind Marg Charitable Trust Ontario, [2022] OJ No 438 (Ontario Superior Court of Justice, January 24, 2022, J.A. Fowler Byrne J.)

The landlord leased premises to the tenant, a trust organization that operated a Sikh temple, community area and a private school. The landlord sought an order stating that the tenancy had been terminated and compelling the tenant to deliver vacant possession of the premises to the landlord.

The landlord and the tenant entered into a lease with an option to renew the lease for an additional year. The terms of the renewal rights were conditional upon the tenant providing 6 months' written notice and not committing any acts of default (as defined by the lease). The tenant exercised its right to renew and received further renewal rights in subsequent lease renewal agreements. The tenant exercised its right to renewal several times, before entering into the lease renewal agreement that is the subject of the landlord's application. The final lease renewal agreement in question provided the tenant with an automatic 1-year renewal of the lease subject to the abovementioned conditions.

At the date of the application, the landlord and the tenant agreed that the tenant had not committed any acts of default and had not provided a written notice to the landlord exercising their option to renew.

When the most recent lease term expired, both the landlord and the tenant were actively negotiating a lease renewal agreement. Correspondence between the landlord and the tenant discussing terms of a potential lease renewal began before the expiration of the prior lease term and continued after the expiry of the lease. Although no agreement was arrived at, a landlord's representative sent the tenant an unsigned lease renewal agreement and informed the tenant that the offer was subject to the president's approval.

The landlord claimed that the tenant did not exercise its right to renew and that, given no written notice of renewal was provided by the landlord, the tenant was overholding (in which case, as per terms of the lease, the tenant was deemed to be a month-to-month tenant).

The Court accepted the tenant's argument that the landlord waived its right of strict compliance with the terms of the renewal option by actively engaging in lease renewal negotiations with the tenant. The Court concluded that through the landlord's conduct, it was clear that the landlord was aware of the tenant's intention to renew the lease. The lease included a provision stipulating that the landlord will not be deemed to waive any of its remedies under the lease unless done expressly in writing. However, the Court determined that, as per terms of the lease, the non-waiver clause specifically pertained to instances where the tenant was in default and therefore did not apply. The court determined that the tenant was entitled to the automatic 1-year renewal of the lease.

The tenant argued that the offer sent by the landlord's representative was binding and that they were entitled to the renewal term set out in the offer and not merely the 1-year automatic term. Although the offer was unsigned, the tenant argued that this was inconsequential. The tenant also argued the equitable doctrine of part performance in the alternative, which allows courts to apply

an oral agreement in instances where it would be unconscionable to apply the *Statute of Frauds* to render a contract unenforceable.

The Court refused both arguments and determined that no lease renewal agreement, written or oral, existed between the parties. The unsigned offer could not be binding as per the Statute of Frauds, which requires all leases be in writing and signed by the party granting or surrendering the leasehold interest. In this case, the offer, as per the landlord representatives' clear instructions, was still subject to the president's approval. The Court also determined that the equitable doctrine of part performance did not apply since the tenant did not establish the necessary elements.

The doctrine of part performance will only apply if a party can establish that it reasonably relied to its detriment on the existence of an agreement and that the opposing party stood by and took advantage of them. The tenant did not suffer any detriment. Although the tenant continued to pay rent, they also continued to occupy the premises.

The respondents were ordered to deliver vacant possession of the premises to the landlord at the end of the 1-year lease term.

Lakeview Towing & Auto Wrecking Ltd v Fleming, 2019 BCSC 2193

Facts

The respondent, Rick Fleming ("the Tenant" or "Mr. Fleming" where the context requires) leased space in a commercial garage from Lakeview Towing & Auto Wrecking Ltd. (the "Landlord"). The Landlord's representatives, Baljit Jhaj ("Baljit Jhaj") and Swarn Jhaj ("Swarn Jhaj") (collectively, the "Landlord's Representatives") were not parties to any agreements formed between the parties, but the Tenant made a series of accusations aginast them including allegations of misrepresentation. The Landlord leased a portion of its auto body shop and pain booth to the Tenant (the "Property"). The parties' relationship was governed by the terms of a commercial lease by verbal agreement, where the Tenant was obligated to pay the Landlord $1,200.00 per month to rent the Property (the "Lease"). As per the terms of the Lease, the Tenant was obligated to pay rent and its share of utilities in respect of the portion of the Property that he occupied. The Lease was a month-to-month Lease that could be terminated by either party on one months' clear notice.

The Landlord, pursuant to a Notice of Application, sought a variety of relief against the Tenant also sought a variety of relief in relation to the Lease a Writ of Possession for the Property in October 2006. In December 2006, the Court ordered the Writ of Possession, along with an Order for the Tenant to vacate the Property, and for an accounting to be conducted.

There was a dispute as to whether the Landlord's Representatives were directly parties to the Lease. At some point in the parties' interactions, the Landlord's Representatives originally quoted a figure of $2,000.00 per month for the price of rent, when the agreed to rate for rent per month as per the terms of the Lease was actually $1,200.00 per month.

On September 17, 2010, a Master of the Court conducted an accounting with respect to determining monies received and outstanding in respect to the Lease as there was a discrepancy in respect of the parties' understandings about amounts paid by the Tenant during the Lease.

Issues:

1. Was there in fact arrears owed by the Tenant?

Held:

1. *Was there in fact arrears owed by the Tenant?*

The Tenant argued that there were no arrears owed. The Tenant argued the first month of the Lease was free and the per month rent was $1,200. The Tenant argued the Landlord was guilty of fraud for claiming rent was at some point $2,000.00. The Tenant argued that there were no arrears of rent under the Lease in the first year and the Tenant the allegation made by the Landlord that no payments were made in the months of April through August 2003.

The Landlord noted that there was already a Master's finding that the Tenant owed $52,800 over the course of the Lease.

The Landlord argued that the Tenant had, based on the evidence paid either $48,250 or $49,050 and that some of the respondents were not parties to the proceeding and that there was no evidence presented to substantiate fraud.

The Landlord argued that the Landlord's representatives were not parties to the proceedings, and the Court agreed. The Court found the evidence that the Landlord's Representatives initially believed rent payable was $2,000.00 instead of $1,200.00. The Landlord argued that there was no evidence to make a finding of fact in relation to false criminal charges being laid by the petitioner against the respondent.

The Chambers Judge dismissed the Tenant's application that attempted to find the Landlord's Representatives in contempt of court and any declaration that they committed, fraud, forgery or perjury. The Court noted the six year limitation for bringing such an action for damages pursuant to the *Limitation Act* RSBC 1996 c 266. The Judge declared that as of December 24, 2015, the time for the Tenant to bring an action for damages had expired.

The Judge found the Tenant was a vexatious litigant pursuant to the requisite jurisprudence on the issue established in *Semenoff Estate v Semenoff* 2017 BCCA 17 which said the trial judge made the vexatious litigant order based not only on the number of proceedings initiated, but also on the litigation strategy adopted in those proceedings – particularly making grave allegations without advancing proof in support of the same.

The Judge in Chambers, on these facts found Mr. Fleming initiated a number of applications in the proceeding which he did not proceed on. Further, he adopted a strategy of making "grave allegations" against the Landlord and the Landlord's Representatives personally, even though they were not parties to the proceeding. The Court ordered that Mr. Fleming could not, without leave of the court, bring legal proceedings against the Landlord or Landlord's Representatives personally.

The judge refused to change the venue of proceeding from Quesnel to Chilliwack on the basis of the outcome of the Orders essentially rendering the point moot.

Conclusion:

The Court found that monthly rent for the Property was $1,200.00 and the term of the Lease was from April 1, 2003 to November 30, 2006. The Court also found that the rent due from the Tenant to the Landlord was $52,800 over the course of the Lease. The Court declared the Tenant had paid $49,050 to the Landlord for rent pursuant to the Lease.

As such, the Court ordered judgment against the Tenant in the amount of $3,750.00 and dismissed the relief claimed by the Tenant claimed in its April 17, 2019 notice of motion.
The Court also declared that the limitation period for the Tenant to bring an action for damages had expired on December 24, 2015, and that Mr. Fleming was a vexatious litigant and must not, without leave of the Court, bring an action against the Landlord, or the Landlord's Representatives.
The Landlord was entitled to costs on Scale B.

1353141 Alberta Ltd v Roswell Group Inc, 2019 ABQB 559

The decision deals with two different proceedings involving family members who embarked on a joint-venture, commercial real estate business without crystallizing the terms of their venture in an express contract. A dispute materialized after a misunderstanding between the parties involving a change in signing authority for a joint account which precipitated a wide array of allegations and counter-allegations including, breach of contract, conversion of partnership monies, and unjust enrichment.

The Court presented its decision by providing reasons for the first docket action followed by the second.

Docket: 1103 02638

Facts:

Two siblings, Raj Kumar ("Mr. Kumar") and Adarsh Gupta ("Ms. Gupta") were involved in a joint venture, with another individual, the husband of Adarsh, Dervinder Gupta ("Mr. Gupta"). Around May 2006 the Guptas (the "Guptas"), together with Mr. Kumar purchased a business condominium in Edmonton, Alberta (the "Property"). The intent of the purchase of the Property was to develop a business where everyone would contribute both labour and financial capital. In the course of their relationship the Guptas transferred their interest in the Property into 1351421 Alberta Ltd ("135") and Mr. Kumar transferred his interest in the Property into Roswell Group Inc ("Roswell"). . In the decision, the Court referred to the agreement as to the Partnership Agreement (the "Partnership Agreement") and the parties as Partners (the "Partners") in a joint-venture Partnership.

To facilitate the purchase of the Property and subsequent business the parties entered into an unwritten agreement. At trial, none of the parties disputed the existence of the said agreement, and on that basis, along with the practical and commercial realities, the Court concluded that the subject agreement constituted a legally binding agreement between the parties

On or about January 1, 2008, the Property was transferred into the names of 135 and Roswell, which both became parties to the Partnership Agreement. At all material times the Guptas were the controlling minds of 135, and Mr. Kumar was the controlling mind of Roswell, both of which were legally registered corporations pursuant to the laws of the Province of Alberta.

After the Property was purchased, the parties made renovations and the Property was rented to tenants. When rent payments began to flow, the payments were deposited into a joint bank account used by the Partners in carrying out the business of the Partnership. The arrangement continued throughout 2008 and into 2009 until the financial institution housing the joint account was wound up. At such time, the partners moved their joint account to Scotiabank. At trial, Mr. Gupta testified that he observed suspicious withdrawals from the account in November, 2010, specifically, payments to Roswell. As a result, the Guptas attended their bank on December 10, 2010, and changed the signing authorities on the Partnership account and altered the arrangement so that

cheques for money withdrawal could be signed by Kumar *and* either of the Guptas. The Guptas indicated to the Court that the bank made an error setting up the new account in a matter that any two of the partners could sign, which was later rectified.

Mr. Kumar testified that he believed the change in signing authority was done with the intention of defrauding him. Mr. Kumar sent his partners an email on December 20, 2010, where he declared his intention to stop depositing money into the joint account. Through this email, the Court found, Mr. Kumar also advised that he would begin billing the Partnership $130,000 for services rendered so far. He accused the Guptas of getting greedy and implied they wronged him. Mr. Kumar advised: "[w]atch me in action to destroy everything I built for you so far" (at paragraph 11).

The Guptas responded by advising that the change in authority was merely meant to allow any of the parties to deposit money, but ensure at least two were necessary to withdraw funds. However, after this, the Court found that Mr. Kumar and/or Roswell, began to deposit rental payments from tenants of the Property into their personal bank account instead of the Partnership's joint account.

The Guptas and 135 filed a Statement of Claim, action No.: 1103 02638, seeking an Order directing Mr. Kumar/Roswell to provide a complete account of all rental payments received by them and expenses paid out; special damages in the amount of $83,476.60; punitive damages in the sum of $100,000.00; and costs on a solicitor and its own client basis; or in the alternative, on a party and party basis.

Mr. Kumar, and Roswell, filed their Statement of Defence in April, 2011 and then filed a Counterclaim against both the Guptas and 135, for breach of contract, unjust enrichment and *quantum meruit*. Kumar's Counterclaim sought loss and damages for lack of contribution to the Partnership from the Guptas, in the amount of $306,000.00; unpaid real estate commission for the leasing of one of the units in the Property; lost real estate investment opportunities in the amount of $250,000.00; and office rentals in the amount of $18,750.00, with the collective damages pled in counterclaim in the sum of $576,246.25.

Then, in October of 2011, 135 filed a Statement of Claim, in action No.: 1103 16585, against Roswell for breach of terms of the Offer to Purchase or Sale in relation to the Property and sought specific performance of the Offer to Purchase or Sale, along with punitive or exemplary damages in the sum of $100,000.00; Roswell defended the claim.

Issues:

1. Is the labour contribution contemplated by the Partnership Agreement?
2. Was the change of signing authority legitimate?
3. Are the claims that Mr. Kumar's rent collection and co-mingling and payment of business expenses founded and inappropriate?
4. Is Roswell entitled to collect for certain invoices billed to the Partnership?
5. Is Mr. Kumar entitled to payment of real estate/leasing commissions?
6. Does Mr. Kumar/Roswell owe the Partnership for use of space at the Property?
7. Is there a valid claim for punitive Damages?

Held:

1. *Is the labour contribution contemplated by the Partnership Agreement?*

Mr. Kumar and Roswell claimed for loss and damages relating to the Guptas' failure to contribute equally to the labour and costs of purchase, handling, managing, and administering the Property, aside from the payment of the initial purchase price. Mr. Kumar argued that the Guptas received the benefit of his labour and were enriched without juristic reason as they were expected to contribute equally to the operation, but according to Mr. Kumar, he failed to do so. Further, he argued the Guptas were unjustly enriched through the benefit they obtained from the income received from the rentals as well as the ultimate increase in the value of the property, which sold for twice its original price.

The Court found, in the context of the unwritten Partnership Agreement that it was logical to affirm the phrase 'equal contribution of labour' which the parties referenced in the proceedings was undefined. However, the Court assessed the agreement through the lens of commercial reasonableness and found that there was an expectation of the parties in respect of the phrase and term of the Partnership Agreement that the Guptas were to take the initiative and needed to do whatever they could to contribute to the Partnership. The Court found that the Guptas did, in fact, participate in the activities of the partnership business in several ways, including:

- Aiding in the organization and supervision of demolition and construction on the site of the Property;
- Payment of the accounts relating to the property and some collection of rent from tenants;
- Preparing the lease template used by the partnership; and
- Responsibility for the Partnership's bookkeeping and accounting prior to Mr. Kumar's assumption of that task.

The Court also found that Mr. Kumar contributed in the following ways:

- He did some work related to the subdivision of the property;
- He was the general contractor on the construction of all three units at the Property, arranged materials, engaged the contractors, and supervised them;
- Acted as the property manager – arranging leasing, collecting rents and serving as the primary point of contact for the tenants; and
- Tracked and paid the building expenses; and
- Kept the Partnership's book for eight years.

The Court rejected Mr. Kumar's evidence that there was an agreement between him and the Guptas where the Guptas agreed to pay him an $80.00 per hour professional fee on the basis there was no such agreement in evidence that could be objectively assessed and ascertained.

Based on the foregoing, the Court dismissed the Counterclaim of Mr. Kumar and Roswell for loss and damages against the Guptas for failure to contribute equally to the labour and costs of purchase, handling, and administering of the Property on the basis of an hourly rate of $80.00. Further, the Court held that the Guptas were not unjustly enriched by Mr. Kumar's activities and

labour contributions for two reasons. First, he was compensated by the reduced rent he paid the Partnership for his own lease of a unit in the Property. Second, both parties made contributions in accordance with their expectations expressed through their unwritten Partnership Agreement.

With respect to the increase in value of the Property, it was found to be an incidence of the ownership of the property by both parties, as well as their equal contributions of labour and finance to the development of the Property.

2. *Was the change of signing authority legitimate?*

The Court considered the evidence of the parties with respect to the issue of change of signing authority. At trial, Mr. Gupta testified that the Guptas found suspicious withdrawals upon review of a bank statement. Thus, when the new account was opened in September, 2009, the Guptas requested that the bank set up the account with a mechanism prescribing two signatories be required for withdrawals, with at least one of the Guptas being a signatory for such transactions. The Guptas evidence at trial was the bank made an error by initially setting up the new account in a manner that any two of all partners could sign, so they went back to rectify the error such that Mr. Kumar and either of the Guptas had to sign for withdrawal cheques.

Mr. Kumar testified that upon learning *any two* of the Partners could withdraw money inferred an attempt to defraud him despite there being no evidence or basis for his belief.

The Court noted the importance of emphasizing that the evidence before it did not demonstrate that the unwritten Partnership Agreement prescribed a precise process or procedure that any or all of the partners must follow with respect to changing of signing authorities vis a vis the Partnership account. Further, the Court stated that despite Mr. Kumar's proposition, the Guptas neither breached a contractual term or violated any legal protocol in pursuing the change in signing authority. Nothing in the evidence before the Judge convinced the judge that Mr. Kumar's concern about the Guptas was valid or justified and the Court found the intention of the Guptas was to make any one of them and Mr. Kumar the signatories for withdrawal of monies and that the clerical error on the part of the bank was not the intent of the Guptas.

In addition, the Court determined that Mr. Kumar's decision to stop paying business monies into the joint Partnership account and into his own (or Roswell's account) was unjustifiable on the facts. The Court did not accept Mr. Kumar's explanation that there were outstanding liabilities and expenses, such as payments of subcontractors, condominium fees, property taxes and utilities.

3. *Are the claims that Mr. Kumar's rent collection and co-mingling and payment of business expenses founded and inappropriate?*

According to the allegations pled in the Statement of Claim by the Guptas and 153, Mr. Kumar's unilateral deposit of rent into his/Roswell's account was a misappropriation of the funds owed to the Partnership, and as such, were the products of conversion.

The Guptas alleged that in 2010, Mr. Kumar and/or Roswell collected three months' worth of rent from one of the tenants at the Property, and two months' rent from another tenant of the Property

and siphoned the rents into their own account in the estimated sum of $17,914.75. Mr. Kumar did not dispute the fact he took the relevant rents; instead, he attempted to justify his actions.

In specific support of Mr. Kumar/Roswell's denial of inappropriate conversion, they gave evidence that the collection of rents and rendering of accounts and transfer of funds was done for proper business purposes and the funds were always accounted for.

Based on the evidence before it, the Court determined that Mr. Kumar admitted to co-mingling of the Partnership's rental payments with his own personal funds and that the Partnership monies were used for his own personal purposes. On the personal deposit of Partnership funds, the Court found no plausible reason for Mr. Kumar's actions, and concluded that he did not create a separate trust account for such funds, instead, he deliberately co-mingled them.

With respect to conversion, the court relied on the definition provided in *916470 Alberta Ltd v Standard Life Assurance Co*, 2005 ABQB 123 at para 22, where Master Breitkreuz referenced a definition set out in Black's Law Dictionary, edition 6:

> "Conversion' is defined as: "[an] unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights" (at paragraph 73).

On the basis of the evidence, the court found the Mr. Kumar's diversion of Partnership funds into the defendant accounts and the co-mingling of rental payments with the defendant's personal funds was in law, conversion.

The Court pointed out that the law relating to conversion prescribes that where converted goods become mixed with the defendant's own goods, the defendant will be held accountable for the goods not strictly proven to be his or her own. The Court stated that it is not called upon to speculate in such a case for the benefit of deliberate wrongdoers, instead, he or she must suffer all of the inconvenience which is the result of the wrong (citing *Lamb v Kincaid (1907), 38 SCR 516 at para 51, 1907 CarswellYukon 51)*.

At the conclusion of evidence in the within matter, the Court issued a Consent Order providing for the appointment of an expert accountant to determine how much revenue was received by the partnership between December 2010 and August 2017; to account for the partnership expenses by Mr. Kumar on behalf of the partnership indicating what payments are substantiated by documentation of proof of payment, and which were not, and determining the balance of cash held by the partnership as of September 1, 2017.

The expert accountant retained (the "Expert") provided a report which Mr. Kumar had several questions about. The Court declined to let Mr. Kumar directly question the Expert, but did convey questions to the Expert, some of which were from Mr. Kumar.

As a finding of fact, based on the expert report, the Court determined that $202,882.75 of rental revenues were deposited in the bank accounts of the Partnership and Mr. Kumar in the seven year period, and the expected revenues should have been $233,710.35; Mr. Kumar had $112,473.06 in

substantiated expenses, but $149,698.82 which were agreed to but without proof of payment, and $21,208.24 in Partnership expenses by Mr. Kumar which were agreed to proof of payment but not supporting documentation; and the balance of cash held by the partnership should be $11,479.94.

On this issue, in its totality, the Court found that only the sum of $112,473.06 (being the amount of Partnership expenses that were substantiated by proof of payment and supporting documentation) was to be credited as being paid by Mr. Kumar while he was in control of the Partnership monies.

4. *Is Roswell entitled to collect for certain invoices billed to the Partnership?*

This issue stemmed from billing by the Mr. Kumar/Roswell to the Partnership for work that was allegedly done to the Property. However, the Court found no evidence of back-up documents for the costs of the renovations. Additionally, the Guptas claimed that Mr. Kumar and Roswell wrongfully paid themselves for alleged work done, which was neither approved nor properly accounted for.

At trial, Mr. Kumar gave evidence that he may have paid less than what he invoiced because some of the items he purchased were directly purchased in the United States at a reduced cost and as part of a separate business venture that did not involve the Guptas. He argued he should be allowed to invoice the cost of the items as they would be in Edmonton, as in his opinion, he was to be compensated for the transportation, storage, duties, and exchange translation associated with the purchases. The Court found no evidence that the parties agreed to that invoicing regime.

As such, the Court concluded, that on this issue, the defendants did not prove the expenses set out in certain Roswell invoices were justified and that Mr. Kumar was to refund the Partnership $21,212.93.

5. *Is Mr. Kumar entitled to payment of real estate/leasing commissions?*

On this issue, the Court considered evidence from the Guptas and Mr. Kumar finding that there was no evidence the Partnership agreed to supplant or replace the real estate services of certain brokers with those of Mr. Kumar's services. The Court found it was inappropriate for the defendants to have paid themselves the leasing commission in the sum of $14,342.99 and that the amount should be refunded to the Partnership.

6. *Does Mr. Kumar/Roswell owe the Partnership for use of space at the Property?*

The Court pointed out that the evidence in the proceedings showed that Mr. Kumar entered into a Lease Agreement with the Partnership dated May 1, 2007, and that the term of the Lease confirmed that the premises he was to occupy in the Property, owned by the Partnership for business purposes were to be computed from the first day of May 2007, and to be fully complete at the end of April 30, 2008, unless otherwise terminated.

Further, the Court accepted Mr. Kumar's admission in evidence that he paid rent pursuant to the Lease agreement between April 2008 and January 2009, in relation to his occupancy of unit 202.

The Court also found the evidence established Mr. Kumar moved back and forth within different units at the Property, the operation of which he had earlier agreed with the other partners should be conducted in a business-like manner. The Court found that Mr. Kumar remained reasonable under the Lease for his occupancy in the Property, and that his obligations continued with the payment of rents to the Partnership on the basis of section 2(c) of the Lease Agreement and that the adjustments were agreed upon with the other partners who own the Property jointly with him.

7. *Is there a valid claim for punitive Damages?*

The Guptas argued that Mr. Kumar's actions were high handed and egregious, as particularly evidenced by his earlier email where he threatened to destroy everything they had built.

The Court considered the decision in *Vorvis v Insurance Corporation of British Columbia*, [1989] 1 SCR at 1107-1108, 94 NR 321, where the Supreme Court of Canada determined that punitive damages are to be awarded only where the conduct is of such a nature as to be deserving of punishment because the nature of the impugned conduct is harsh, vindictive, reprehensible and malicious. The Guptas pointed to Mr. Kumar's conduct during litigation and his reaction to lawful requests from their solicitors during Questioning as argued it was condescending and obstructive to the resolution process. Mr. Kumar put forward the argument that a few testy exchanges on the record in questioning do not constitute litigation misconduct, and the Guptas failed to bring an application to compel information they felt they were entitled to and from that, punitive damages were unjustifiable.

According to the Court, the law governing the relationship between conversion and punitive damages requires an element of malicious and vindictive conduct for punitive or exemplary damages to be awarded. The Court found that before awarding punitive damages it was necessary to consider whether the misconduct was so outrageous that punitive damages are rationally required to act as a deterrent, per the Supreme Court of Canada in *Hill v Church of Scientology of Toronto*, [1995] SCR 1130.

The Court opined on the role and utility of punitive damages and pointed out that they are to be awarded against a defendant in exceptional cases where the defendant's actions were malicious, oppressive and high-handed that offends the courts sense of decency (citing Performance Industries Ltd V Sylvan Lake Golf & Tennis Club Ltd, 2002 SCC 19.

The Court found that Mr. Kumar's actions were malicious, oppressive and high-handed. According to the decision, Mr. Kumar's conduct represented a marked departure from ordinary standards of decent behavior (at para 142) and his conduct was so bad that there was a rational link drawn between the conduct and the need for deterrence.

Conclusion – re Docket: 1103 02638

The Court found for the Guptas and 135 because they successfully established their claims against the defendants. With respect to each issue, the Court concluded as follows:

1. Labour contribution: the parties contributed equally to the joint venture in compliance with unwritten terms of the Partnership Agreement;
2. There was no impropriety with respect to the Guptas changing signing authority, there was a clerical error that was not the product of their intent, and they remedied the error enabling protection for Mr. Kumar;
3. Mr. Kumar/Roswell improperly collected deposited Partnership proceeds into personal accounts without juristic reason;
4. Mr. Kumar/Roswell could not prove expenses set out in certain invoices;
5. There was no basis for real estate commission fees charged by Mr. Kumar/Roswell and they had to remit fees back
6. Mr. Kumar/Roswell owed $152,775 for unpaid rents between August 2009 and August 2017l and
7. Mr. Kumar's conducted amounted to conduct that was meritorious of a punitive damages award in the sum of $50,000.00.

Docket: 1103 16585

Additional Facts:

An Application relating to the first docket was adjourned and prior to the adjournment date solicitors for Roswell sent an email conveying an offer for the Property which was accepted per the terms of the email by 135's solicitors. As per the terms, 135 would purchase Roswell's one half interest share in the Property for $312,225.00.

Issues:

2. Did the Plaintiff in Action No.: 1103 16585 (135 Alta) and the Defendant (Roswell) form a binding agreement for 135 Alta to purchase Roswell's interest in the Property by way of exchange of correspondence between their solicitors between September 23 and September 26, 2011?

    a. Was there valid Offer and Acceptance between the parties in this case?
    b. Are the three essential terms present?
    c. Are the requirements of the *Statute of Frauds* met in this case?
    d. Is a formal memorandum – Transfer of Land – required in Alberta for a valid transfer of interest in land?

Held:

b. Was there valid Offer and Acceptance between the parties in this case?

135 argued that the email of September 23, 2011, constituted a valid offer from Roswell because the subject line included the word offer, the contents referenced a "multi-faceted offer" setting out a "shotgun" structure – wherein the second option was for 135 Alta to buy Roswell's interest in the Property in exchange for $315,225.00; and the email attached several items explaining how Roswell came about proposing the purchase price and terms including handwritten notes from Mr.

Kumar. Roswell argued that the information in the email was merely a starting point for discussions and that its solicitors were not authorized to convey any offer to 135 Alta.

The Court observed that the email from Roswell's solicitors was silent on the potential distinction between the value of the raw land and the structural Property, and neither the email attachments nor Mr. Kumar's handwritten notes made any reference to the distinction between raw land value versus one half share interest in the Property.

The Court found that from an objective perspective, it was reasonable to infer that the options contained in the email were structured in a buy and sell, and the shotgun manner by the solicitors representing Roswell.

The Court referenced the Alberta Court of Appeal's decision in *Apex Corp v Ceco Developments Ltd*, 2008 ABCA 125 where the Court of Appeal described the nature and legal effect of a buy/sell or shotgun agreement noting, that with a shotgun agreement, the *offering party* could *offer* to either buy the receiving party's interest or sell the receiving party the offering party's interest. The receiving part was given a timeline to accept the initial offer and if it did not accept the offer then the receiving party would be deemed to make the same offer to the party that made the initial offer.

The Court opined on the "options" contained in the September 23, 2011 email and found the terms reflected a "shotgun" model or approach as described by the Court of Appeal in Apex. The Judge explicitly rejected the argument that 135 Alta ought to have known that the $315,225.00 price tag in the email was not an offer but a misconstrued proposal given its earlier proposition to dispose of its interest in the property for $500,000.00.

According to the Court, the legal principle governing the relationship between a solicitor and his/her client was reiterated by the Court in *Wasylyshyn v Wasylyshyn*, 2008 ABQB 39, where the Court held that the terms of an agreement regarding and must be found in writing, and the solicitor for party can certainly provide such writing, being an agent with sufficient authority."

The Court found that Roswell's solicitors properly made the offer on September 26, 2011, and that it could not be withdrawn by Roswell on the basis of the general rule in contract law that an offer can be revoked by the offeror at *any time* before it is accepted" (Halsbury's laws of Canada (online), *Contracts* (II2(1)) at HCO-8 "Revocation" (2017 Reissue).

c. Are the three essential terms present?

According to the Court, for a valid transfer of an interest in land to occur, three material terms must be present – parties, the property, and the price, *Jusza v Dobosz*, 2003 ABQB 512. The Court also relied on *Leoppky v Meston*, 2008 ABQB 45 at para 28 confirmed that a contract is void for uncertainty without the three essential terms of price, parties, and property. The general legal principle is also recognized in the context of the *Statute of Frauds*.

The Court found, that on the evidence, Mr. Kumar (on behalf of Roswell) acknowledged he was engaged in negotiations and transactions with the Guptas (on behalf of 135) using the agency of solicitors. The Trial Judge found that Roswell's solicitors initiated the shotgun option offer for the

sale of interests in the Property and that 135 was the receiving party or purchaser while Roswell was the seller.

With respect to property, the Court was satisfied that the email and attachments clearly identified the Property.

The Court also found that price was sufficiently established, although GST was not expressly identified in the offer.

With respect to the issue about terms of payment, closing date and possession was found to be sufficiently clarified by the terms of the email correspondence between the respective solicitors. The Court found that the sale of shares in the Property was not t eh classical real estate purchase contract, rather, it was the sale or transfer of interest in land in relation to a jointly owned commercial property.

On the evidence before him, 135 Alta confirmed acceptance within three days of the original offer that was required in the email. Further, the tendered purchase price was delivered in cash within approximately 2 weeks.

Roswell put forward an Alberta Court of Appeal decision, *Marquardt v Gray*, 2013 ABCA 2000, as authority for the legal principle the possession date was an essential term for a real estate transaction. The Court found that case was distinguishable from the facts at bar on the basis of different nature of the contract, and the shotgun nature of this contract. The Trial Judge said "[i]n my opinion, nothing turns on the lack of such express agreement on possession or closing dates by Roswell and 125 Alta" (at 202).

The Court also rejected Roswell's argument about lack of clarity with the subject to financing term in the offer finding that in reality, 135 Alta did not seek to finance its purchase of Roswell's share of the Property. It was Roswell that potentially needed financing and sought to extend the same condition to 135 Alta. The Court found that in the circumstances, financing was neither an essential term of a contract for sale or transfer of land nor a mandatory condition for all and every real estate transaction. Further, if 135 Alta had the funds to readily complete the transaction; common sense dictates that it would not require financing from the bank or elsewhere.

d. Are the Requirements of the Statute of Frauds Met?

The Court found that Roswell's solicitors had the lawful authority to sign on Roswell's behalf as its agent. Consequently, on the basis of the emailed signature of Roswell's solicitors, appended to the first email of September 23, 2011, the requirement for a signature under section 4 of the Statute of Frauds was successfully met.

e. Is a formal memorandum – Transfer of land – required in Alberta for a valid transfer of interest in land?

According to the Trial judge, on the facts of the case, there was an intention to create legal relations and there is an enforceable contract. Both parties were presented by counsel. The parties were

involved in ongoing litigation regarding the property. The email was sent in the context of a pending court application to be heard the week after the email was sent. The parties were not arm's length parties.
Conclusion:

Conclusion Re: Docket: 1103 16585:

The Court held that there was an enforceable contract because the requisite material terms were present and substantiated in the course of the litigation. Further, despite the lack of subsequent formal signed agreement, through reference to the law of agency, the Court concluded that solicitors for Mr. Kumar/Roswell had the proper authority to enter into the agreement, and the agreement was properly offered and accepted.

Wachter Horses v Schwizer, 2021 ABPC 186

Facts

The defendants were tenants in both a residence and a shop on the landlord plaintiffs' property. The claim was brought by the landlords for damages to the residence, costs of restoring the shop to its pre-rental state, damage, shelf removal, and unpaid utilities. The tenants counterclaimed based on a verbal agreement to improve the shop in exchange for a rent reduction and unjust enrichment based on diverting power to the landlord's own water heaters, and the landlord's failure to improve the shop based on a verbal contract that caused a lost business opportunity for the tenants. All contracts were oral and had unspecified terms, resulting in a trial over conflicting oral evidence.

Issues

1. What, if any, aspects of the claim or counterclaim were made out?
2. Was the counterclaim barred by the *Limitations Act*?

Held

1. What, if any, aspects of the claim or counterclaim were made out?

The case was based almost entirely on oral evidence, much of which was given directly by the parties themselves. In the absence of any evidence as to the pre-occupancy condition of the property, the Court declined to make any award for damage to the property. Conversely, the oral contracts alleged by the tenant were not supported by evidence. Both the claim and counterclaim were largely unsuccessful since the Court lacked the evidence to make the necessary facts on the balance of probabilities.

2. Was the counterclaim barred by the *Limitations Act*?

The only significant legal argument was the tenant's position that its claims for equitable set-off based on abatement of rent, unjust enrichment, and lost business opportunity should be heard despite the expiry of the limitation period. The Court found that the case law cited in favour of that position did not support it, and held in any event that the claims failed on their merits.

Conclusion

The Claim and Counterclaim were were both minimally successful, with only small awards granted for the few expenses that could be proven.

Booster Juice Inc v West Edmonton Mall Property Inc (2019), 2019 ABCA 58

Facts:
The respondent, Booster Juice Inc (the "**Tenant**"), was responsible for negotiating leases for Booster Juice retail locations. The Tenant already had a successful location operating in Phase III (the "**Phase III Kiosk**") of West Edmonton Mall ("**WEM**") and wanted to add a second kiosk in Phase I (the "**Phase I Kiosk**"). The Tenant entered into negotiations with the appellant, West Edmonton Mall Property Inc (the "**Landlord**"), the leasing entity for WEM's owner. The parties entered into a lease agreement for a new kiosk in Phase I of WEM with a term commencing November 1, 2013 (the "**Phase I Lease**"). A dispute arose between the parties over the location of the Phase III Kiosk which resulted in the Landlord closing both of the Tenant's WEM kiosks.

The Trial Judge found the following:

1. The Tenant breached the Phase I Lease by failing to pay rent from November 1, 2013 forward;
2. The Landlord breached the Phase I Lease by unilaterally moving the location and orientation of the Tenant's proposed Phase I Kiosk; and
3. The Landlord improperly terminated the Tenant's Phase III lease agreement (the "**Phase III Lease**") by invoking a cross-default clause contained in the Phase I Lease.

At Trial, judgment was given in the Tenant's favour for the improper closure of the Phase III Kiosk in the amount of $30,738.00. Judgment was granted in the Landlord's favour in connection with the Phase I Lase in the amount of $64,572.00. Given the divided success, each party was responsible for their own costs.

The Landlord then appealed the decision on whether the Trial Judge correctly determined that the Phase III Kiosk had been closed improperly, resulting in the closure of the Phase III Kiosk on the basis of a cross-default clause contained in the Phase I Lease.

Issues:

1. Was there an error in finding that the Landlord breached the Phase I Lease?
2. Was there an error in the assessment of the applicability of the cross-default clause?
3. Was there an error in the assessment of damages?
4. Was there an error in the finding on costs?

Held:

1. *Was there an error in finding that the Landlord breached the Phase I Lease?*

The Court, citing ***Housen v. Nikolaisen***, 2002 SCC 33 at paras 36-37, noted where there is an absence of an extricable question of law, questions of fact and mixed fact and law are reviewable for palpable and overriding error.

In determining whether the Landlord repudiated the Phase I Lease, the Court considered the decisions of ***First City Trust Company v Triple Five Corporation Ltd,*** 1989 ABCA 28 at paras 29-30 and [***First City***] ***Stearman v Powers***, 2014 BCCA 206 at para 21 to note that "the innocent party to a breach of contract may be entitled to treat the breach as repudiatory where the breach is

fundamental, because it deprives that party of substantially the whole benefit of the contract" (at para 13).

In this case, the Landlord unilaterally changed the location and directional orientation of the Phase I kiosk when it approved the Tenant's proposed design for the kiosk subject to the change in location. The Landlord's change constituted a fundamental change to the Phase I Lease, which caused the terms of the Phase I Lease to become unclear and thus the change to the Phase I Lease was no longer valid.

There was evidence presented at Trial that the specific location and orientation of the Phase I Kiosk was significant. The Tenant agreed to the original Phase I Kiosk location because it would be close enough to the main corridor to entice mall patrons to the Phase I Kiosk, thus increasing its revenue and profitability. Further, there were multiple meetings and emails between the parties pertaining to the precise location and orientation of the kiosk as it existed in the Phase I Lease.

The Court determined that the overall location and configuration of the Phase I Kiosk was fundamental to the Phase I Lease, and that the Landlord's unilateral change to the agreed location, which was further away from the usual patrons' traffic flow and with a different directional orientation, deprived the Tenant of substantially the whole benefit of the Phase I Lease.

Based on ***Guarantee Co. of North America v. Gordon Capital Corp***., [1999] 3 SCR 423 (SCC) at para 40, the Court determined that where a repudiatory breach occurred and was accepted by the other party, the contract was terminated and the parties were discharged from future obligations. In this case, the Tenant accepted repudiation of the Phase I Lease on April 30, 2014 through its conduct. The Court determined that acceptance by conduct was shown through the Tenant conducting itself in a manner inconsistent with its obligations under the contract and which was sufficiently unequivocal to constitute acceptance of the Landlord's repudiation by:

- failing to commence construction at the Phase I location as requested by the Landlord;
- raising the issue of the new location and orientation of the proposed kiosk with the Landlord at a meeting on April 25, 2014; and
- continuing to fail to pay either the Phase I rent when due or the accumulated arrears.

This conduct amounted to acceptance of the repudiation. By April 30, 2014, the Tenant had accepted the Landlord's repudiation of the Phase I Lease and the parties were thus discharged from their future obligations under the Phase I Lease.

2. *Was there an error in the assessment of the applicability of the cross-default clause?*

The Phase I Lease contained a clause which stated:

> "This Agreement shall be cross defaulted with the Tenants [*sic*] other location, Unit T-101, Phase III, of West Edmonton Mall, in that any default by Tenant hereunder shall be deemed a default thereunder and vice versa."

No cross-default clause was contained in the Phase III Lease between the parties.

The Trial Judge relied on its equitable jurisdiction to grant relief from forfeiture and determined that the Landlord could not apply the cross-default clause contained in the Phase I list to terminate the Tenant's Phase III Lease.

The Landlord relied on the cross-default clause when it issued a Notice of Default on June 2, 2014 and a Notice of Termination of the Phase III Lease on July 29, 2014. Because it was found that the Phase I Lease terminated by April 30, 2014, the rights under the cross-default clause were extinguished by the time the Notice of Termination was issued.

After considering ***Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.***, [1994] 2 S.C.R. 490 (S.C.C.) at 504; ***Wewaykum Indian Band v. Canada***, 2002 SCC 79 at para 107; and ***Globex Foreign Exchange Corporation v. Kelcher***, 2005 ABCA 419 at para 18, the Court stated that it had discretion on whether to grant an equitable remedy, including relief from forfeiture. After considering ***Canpar Holdings Ltd. v. Petrobank Energy & Resources Ltd***., 2011 ABCA 62 (Alta. C.A.) at para 12, the Court stated that this discretionary decision was not available for appellate review unless it was unreasonable or based on an error in principle or law. The Court determined that this same standard applied to damage awards, after considering ***Naylor Group Inc v. Ellis-Don Construction Ltd***, 2001 SCC 58 (S.C.C.) at para 80.

The Court determined that even if the cross-default clause was enforceable, relief from forfeiture should be granted. The Court's power to grant such relief was purely discretionary and the factors to be considered were:

- the conduct of the applicant;
- the gravity of the breaches; and
- the disparity between the value of the property forfeited and the damage caused by the breach.

It was found that the Phase III Kiosk was a proven, profitable location and that its forfeiture would result in substantial loss of profits for the Tenant and its Phase III franchisee. Particularly, this was shown by:

- the Phase III Kiosk had been operating successfully for over a decade with low likelihood of defaulting on its lease;
- there was no evidence that the Phase III Kiosk had any issues with financial stability, while the Phase I location was uncertain with no proven record of success;
- the prior issues between the parties regarding renovations of the Phase III Kiosk had been settled by the time the Phase III Kiosk had been shut down;
- it was unlikely that the Tenant was going to vacate the Phase III Kiosk; and
- the Phase III Kiosk was profitable and forcing it out of the location would result in lower rental income to the Landlord.

It was clear that there were no grounds to grant relief, and the termination of Phase III Lease was not upheld. There was sufficient evidence to support the finding that the Tenant would ultimately bear a significant loss from the termination of the Phase III Lease.

Wong v Magnuson, 2020 BCSC 1752

Facts:

This is an application for a writ of possession by the landlord, Mr. Wong (the "**Landlord**"), in addition to an application for relief from forfeiture by the Tenants. Neil Magnuson and Serious Hope Society (the "**Tenants**") approached the Landlord about using the premises to assist people with addiction disorders and the Landlord accepted but deposed that he was unaware the Tenants' plan included operating a cannabis store from the premises. The lease between the parties was verbal and operated on a month-to-month term. with no set termination date. On July 13, 2020 a City Inspector attended the premises and determined the Tenants were operating the cannabis store without the necessary permits, and advised the Landlord to this effect. Further, the City Inspector further advised the Landlord that he could face liability if the cannabis store continued to operate on premises. The Landlord delivered notice of termination and notice to quit to the Tenants, but the Tenants did not vacate, and sought relief from forfeiture.

Issues:

1. *Whether the Landlord is entitled to a writ of possession, or the Tenants are entitled to a relief from forfeiture.*

Held:

1. *Whether the Landlord is entitled to a writ of possession, or the Tenants are entitled to a relief from forfeiture.*

In June of 2020, the Landlord leased the premises to the Tenants under the belief it would be used for the purpose of assisting individuals on Vancouver's Downtown Eastside who suffer from substance abuse disorders. The parties entered a verbal lease in June of 2020 for a month-to-month tenancy. On July 13, 2020, the Landlord was notified by the City Inspector that pursuant to an inspection of the premises, the Tenants were operating as a cannabis retailer without the required permits. The City Inspector ordered that the premises cease being used as a cannabis retailer within 14 days, failing which the matter would be referred to the City Prosecutor, where the Landlord may be liable for a minimum fine for $250 per day for each day the offence continues.

Neil Magnuson was the operator of a project called The Healing Wave, which provided space to a registered non-profit society called the Serious Hope Society that runs a cannabis substitution program. This program provided cannabis as an option to individuals addicted to opiates, with the purpose of the cannabis being a substitute for opioids, being sold at a cost below what individuals may illegally pay for opiates purchased on the street. The Court noted the premises were located in an area of the city where the zoning prohibits the sale of cannabis and cannabis dispensaries. Aside from the zoning issues that would likely result in a development permit from the City of Vancouver being denied, the Court also noted the Tenants would need to undertake a number of steps with both municipal and federal authorities to be able to legally operate the cannabis substitution program from the premises. The Court noted the necessary municipal and federal licenses required to operate would likely take beyond 6 months to process, and that the outcomes

for such processes were uncertain. The Court further noted in this regard that the Tenants' cannabis suppliers were not authorized to produce cannabis under the federal legislation, which would be another issue that would need to be addressed.

On July 29, 2020 the Landlord delivered a notice of termination and notice to quit. These documents terminated the lease, effective August 31, 2020. Despite these notices, the Tenants failed to vacate the premises. The Court noted as of the date of hearing this matter, October 19, 2020, the Tenants were still in possession of the premises and continued to operate a cannabis store.

In this case, the Court was satisfied the Tenants wrongfully held the premises against the rights of the Landlord, pursuant to section 18 of the *Commercial Tenancy Act*, RSBC 1996, c 57 (the "CTA"). According to the Court, the issue then to be decided in this matter was whether the writ of possession should be issued per the Landlord's application, or whether the Court should accede to the Tenant's, granting their application for relief from forfeiture. Relief from forfeiture is governed by section 24 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, which provides a court may relieve a party from all penalties and forfeitures the court thinks fit. The Court noted this is an equitable remedy, which the Court can exercise discretion in using. On this basis, the Tenants' requested the Court grant such relief to reinstate the lease and adjourn the matter 6 months while the Tenants' pursue the necessary licenses. According to the Court, the factors to be considered in whether it grants this remedy are the conduct of the Tenants, the gravity of the breaches, the disparity between the value of the property forfeited, and the damage caused by the breach. The Court also noted the party seeking such relief should come to the court with "clean hands" while disclosing all relevant matters to the Court.

The Court declined to exercise its discretion to grant relief from forfeiture. Considered in its totality, the Court found the conduct of the Tenants in this case did not weigh in favour of granting such relief. The Court found no evidence of the Landlord consenting to the use of the premises as a cannabis store, which was a use that did not comply with the City's bylaws, and which exposed the Landlord to potential liability and prosecution. In addition, the Court found it was likely the Tenants knew they were operating the cannabis store without the necessary municipal and federal licenses. While the Court noted the Tenants' did not wish to prejudice the Landlord through its operations, the Court could not find the that the Tenants came to the Court with clean hands, given the illegal conduct.

The Court placed considerable weight for not granting a relief from forfeiture in this case on the disparity between the value of the property forfeited and the damage caused by the breach. In this case, the Court considered the damage caused by the continued operation of the cannabis store. While the Tenants monthly rent for the premises was $1,800.00, the Court found this rental amount paled in comparison with the damage that could be caused to the Landlord by the continued operation of the cannabis store. According to the Court, if prosecuted and convicted, the Landlord would be liable to a fine of at least $7,500.00 per month, and this factor weighed heavily against granting the relief. Without the ability of the Tenants to provide security or indemnity for potential fines faced by the Landlord, nor any commitment to cease operations at the premises, the Court was unable to reconcile terms that could be imposed with a relief from forfeiture that would be fair and equitable in the circumstances.

Conclusion:

The factors to be considered by the Court in granting a relief from forfeiture under section 24 of the *Law and Equity Act* include the conduct of the Tenants, the gravity of the breaches, the disparity between the value of the property forfeited, and the damage caused by the breach (*Saskatchewan River Bungalows v. Maritime Life Assurance Co*, 1994 CanLII 100 (SCC), [1994] 2 S.C.R. 490). When considered in its entirety, the Tenants' conduct did not weigh in favour of granting relief from forfeiture. In this respect, the Court was particularly critical of the Tenants' failure to obtain the Landlord's consent for the use of the premises as a cannabis store, a use which the Court noted was contrary to the City's bylaws for the location of the premises and one that may have subjected the Landlord to liability and prosecution. According to the Court "it would, in my view, be unjust for the petitioner to be held financially responsible for the respondents' illegal operation of the program."

Eng v Wong, 2020 BCCA 148

Facts

The plaintiff tenant alleged that he stored certain machinery and other equipment on the leased premises and that the defendant landlord wrongfully detained those goods, and either unlawfully disposed of them, or converted them to his own use. A summary trial application was brought by the plaintiff and was dismissed. The trial judge found, inter alia, that the defendant was, at all times, acting as an authorised agent for the landlord, that the plaintiff's lease did not cover the area in which the chattels were stored, and that the defendant gave the plaintiff adequate notice to remove his chattels. The plaintiff appealed.

Issues

1. Had the landlord unlawfully interfered with the tenant's chattels by removing them from the property

Held

1. Had the landlord unlawfully interfered with the tenant's chattels by removing them from the property?

At trial, the trial judge found even if there had been a verbal agreement allowing the plaintiffs to use the additional space outside the lease for storage, that agreement was not a lease but rather a license or permission given to the plaintiffs on behalf of the landlord, without consideration, for the plaintiffs to use that space. As such, it could have been revoked by the landlord at any time. The landlord gave the tenant adequate notice to remove his chattels and he told them twice that if the chattels were not removed within the time stated they would be removed and disposed of at their expense.

The tenant was self-represented and filed a garbled string of incomprehensible pleadings. Its strongest "evidence" was a letter, purportedly signed by an officer of the landlord's corporation as well as the tenants themselves which stated that the landlord's agent had acted without authority and had illegally moved the

In the result, the Court dismissed the appeal and affirmed the trial judgment, including the judgment for special costs of the trial. With respect to the appeal, the respondent was entitled to party and party costs on scale 1.

Conclusion

The appeal was dismissed. There was no evidence supporting idea that the plaintiff had a lease over the additional storage area. To the extent that he had a license, it was revocable, and he was furnished with adequate notice of its revocation.

Beyond Mars Promotion Inc v Chin, 2019 BCPC 234

Facts

The defendants, Brandon Chin ("Mr. Chin") and Yung Kang Lee ("Ms. Lee") (collectively, the "Landlord") owned commercial property and leased a portion thereof to the tenant, Beyond Mars Promotions Inc. (the "Tenant"). The commercial property subject to the Action was a strip mall was located in a strip mall in Delta, British Columbia (the "Premises"). The parties entered into a commercial landlord-tenant lease in 2008 (the 'Lease"). In April 2017, the Lease became a month-to-month lease.

A fire occurred at the Premises in 2017 (the "Fire"). Consequently, power was shut off to the Premises, rendering the Tenant incapable of running its business. Later, in October 2017, the Tenant notified the Landlord of its intention to vacate the Premises, although the Tenant remained in occupation of the Premises until January 2018.

The Tenant brought an application to amend its claim so it could advance a claim for breach of the fundamental covenant to quiet enjoyment of the Premises. The Landlord sought an order dismissing the Tenant's claim. The Tenant's Notice of Claim contained no allegations of inadequate maintenance of the Premises precipitating the Fire. Regardless, the Tenant continued pursuit of its action to recover lost business in October 2017, along with other associated costs of business relocation and losses related to the fire.

The parties attended a settlement conference in June 2018, at which time the presiding Judge ordered the parties to disclose certain documents to each other. The Tenant failed to meet this obligation multiple times and incurred cost obligations as a result. Wawanesa Mutual Insurance ("Wawanesa") was included in the action due to their alleged failure to honour a claim by the Tenant's against its business interruption insurance; that claim was resolved before the within Application was heard.

Issues

1. Has the Tenant had sufficiently established its claim to amend its Notice of Civil Claim?
2. Did the Tenant's pleadings adequately disclosed negligence as a cause of action in the within Action?
3. Should the matter be set for a 5-day trial?

Held

1. *Has the Tenant had sufficiently established its claim to amend its Notice of Civil Claim?*

The Tenant's application to amend its Notice of Civil Claim, adding an allegation of interference with its right to quiet enjoyment of the leased Premises was dismissed.

The Court determined that the original Notice of Claim alleged the Landlords did nothing to maintain the property and that there were issues with a hole in the parking lot, water leaking, and

a rodent infestation. The Court found there was a lack of clarity in some of the allegations pled with respect to the fire itself.

According to the Court, the difficulty with the original Notice of Claim had to do with insufficient pleading of negligence. The Court found the pleadings failed to set out what act or failure of the Landlord precipitated the Tenant's loss. The Court called the Tenant's pleadings "woefully deficient" (at para 17).

The Tenant provided authorities in support of its application to amend the Notice of Claim and put forward the following test:

1. The threshold to grant the proposed pleading amendment is low;
2. If the proposed pleadings disclose a reasonable cause of action the application should be granted, unless at the time of the amendment the cause of action is past the limitation period.
3. The court must consider any actual prejudice to the opposing party but the court must also consider the importance of having the substance of the dispute or the real questions between the parties determined on its merits

(at paragraph 19).

The Tenant provided several examples of situations which it argued that were akin to a breach of the tenant's quiet enjoyment, including:

- A Landlord's repeated threats to evict;
- Standing at her door and shouting at her;
- Sexually harassing a Tenant in her apartment;
- Dust, dirt, and noise as a result of construction initiated by the Landlord; and
- The landlord disconnecting the power to the Premises and the Landlord's unwillingness to fix water leakage.

The Tenant advanced an argument that the law has developed with respect to breaches of the implied covenant of quiet enjoyment and does not require the claimant to establish a causal connection between an act or failure to act by the Landlord and the breach of the tenant's quiet enjoyment. The Court explicitly rejected that logic, establishing that it was a fundamental misinterpretation of the law in the area of commercial tenancy.

The Court, relying on an excerpt from a text on commercial leasing, specifically, a chapter on Quiet Enjoyment, found the Tenant must put forward a substantive allegation raising the issue of substantial interference by the Landlord and the tenant's quiet enjoyment of the leased premises, or an allegation the Landlord derogated from its grant to the tenant of the right to quiet enjoyment of the lease premises.

The Court determined that … "on the basis on the law presented before me on this application upon which I conclude that the amendment sought by the Tenant could succeed at trial, absent an

allegation in the pleadings as to what act or failure to act by the defendants caused the October 4, 2017 fire which precipitated the fire" (paragraph 31).

As such, the Chambers Judge dismissed the Tenant's application to amend its Notice of Claim to add the breach by the Landlord or the implied covenant of the Tenant's right to quiet enjoyment as a result of the October 4, 2017, fire.

The Court expressly inferred that based on the preceding court appearances and the two monetary penalties imposed against the Tenant that the Tenant presented its best case for the proposed an amendment to the Notice of Claim. From that, the Court stated the best case:

> "falls woefully short of the required allegations to support the proposed amended claim and I am not satisfied that affording the claimant more time to draft or redraft their requested pleading amendment will result in a different conclusion" (at para 34).

2. *Did the Tenant's pleadings adequately disclosed negligence as a cause of action in the within Action?*

The Court dismissed the Tenant's claim in negligence against the Landlord in its entirety as there was a complete failure of the Tenant to adequately plead the cause of action or demonstrate any evidence of causality with respect to the Landlord's action and the Fire.

According to the Chambers Judge, there was no basis in law or in equity to conclude the Tenant would succeed in demonstrating negligence on the part of the Landlord and the steps it took maintaining the space.

3. *Whether the matter was to be set for a 5-day trial*

In order to determine this issue, the Court had to determine the outcome of the Landlord's application to strike the Tenant's claim based in negligence. As per Rule 7.5(14)(i) of the *Small Claims Rules*, regarding trial conferences, a judge has the authority to dismiss a claim at a trial conference if the claim is without reasonable grounds or discloses no triable issues.

The Judge concluded the Tenant failed to produce an expert opinion with respect to the standard of care owed by a commercial landlord to its tenant, the manner in which the standard of care was breached on the facts at bar, and that the alleged breach caused the Tenant's losses. Counsel for the Tenant claimed that the Tenant, at the time of oral submissions, did not have an expert report and that the breach of the covenant of quiet enjoyment was the principal cause of action being advanced by the Tenant. The Tenant argued that there was no need to prove causation in the breach claim, which the Court found to be an erroneous position in law.

As the Judge had already dismissed the Tenant's application to amend its Notice of Claim, the only remaining claim disclosed in the Landlord's pleadings was the negligence claim, which according to the Court, failed to include essential pleadings outlining the material facts relied upon by the claimant supporting the necessary allegations in a standard negligence action. Essentially,

the Court agreed with the Landlord's suggestion there was no reasonable cause of action disclosed by the claim. The Court determined there was no basis for the Landlord to know with any specificity what the allegations against it amounted to.

As of the time of the within application, the matter had already been before the Court for four trial conferences and based on that fact, the Court ruled the Tenant had sufficient opportunity to consider pleading amendments that it wished to place before the Court bearing in mind the evidentiary basis already established on the record to that point. The only pleading amendment sought by the Tenant was the amendment to allege breach of the quiet enjoyment of the leased Premises. The Court found, to that point, despite four trial conferences, the Tenant failed to put forward any evidence pointing to the cause of the fire that could reasonably support the allegations of negligence against the Landlord.

Conclusion

The Chambers Judge dismissed the Tenant's application to amend its Notice of Claim against the Landlord for breach of their right to quiet possession of the leased Premises. The Landlord's application to dismiss the claim for failure to plead a reasonable cause of action was granted. The Tenant's application to set the matter down for a five-day trial was dismissed, on the basis of the Court's dismissal of the negligence claim. The Court declined to set aside the $500.00 penalty imposed against the Tenant for failure to disclose certain documentation.

Broadway – Heb Property Inc v BCIMC Realty Corporation, 2019 BCSC 1693

Facts

The petitioners, Broadway Heb Property Inc. (the "Landlord") controlled a premises leased to the respondent tenant, Renegade Productions Inc. ("Renegade"). The Tenant was leasing space in a commercial property in Vancouver, British Columbia (the "Premises") from the Landlord pursuant to the terms of a written agreement (the "Lease"). The Tenant's business was to rent out parts of the Premises for various artistic pursuits including studio and rehearsal space. The Tenant leased 16,000 square feet spread over 40 rooms in the Premises. The Tenant signed the Lease in February 2017, for a five-year term, with gross rent due each month in 2018 and 2019, plus additional rent.

Early on in the term of the lease, disputes materialized between the parties with respect to the quality of the Premises with respect to water leaks and water damage. On January 23, 2019, the Landlord sent a notice of default to the Tenant claiming it was in violation the Lease. On February 11, 2019, the Tenant sent a letter to the Landlord alleging the Landlord had violated parts of the Lease and that it was entitled to complete abatement of the full amount of the rent.

The Landlord sought to obtain a Writ of Possession pursuant to section 21 of the *Commercial Tenancy Act*, RSBC 1996, c 57 (the "*CTA*") that would force the Tenant to quit their occupancy and vacate the Premises. The Tenant refused to vacate the Premises, which precipitated the application.

The Tenant had not paid rent for several months, and the Tenant conceded that the procedural requirements pursuant to sections 18-21 of the *CTA* were met. However, the Tenant argued that the Landlord was in breach of the agreement, which gave rise to the right of abatement offsetting the Tenant's requirement to pay pursuant to terms of the lease.

The Tenant applied for an order requiring the question of whether the Landlord was entitled to a Writ of Possession to be set for a 10-day trial, at which point the Tenant intended to argue its abatement defence and bring a counterclaim for damages and specific performance against the Landlord.

Issues

1. Was the Tenant was entitled to remain in possession of the Premises pursuant to the terms of the Lease?

    a. Who bears the onus under the *CTA* of showing entitlement to remain in possession?
    b. Should the petition be converted to a five-day trial?
    c. Did the Tenant wrongfully hold possession?

Held

1. *Was the Tenant was entitled to remain in possession of the Premises pursuant to the terms of the Lease?*

The Tenant argued the damage to the Premises interfered with its right to quiet enjoyment in the affected parts of the Premises and was therefore entitled to an abatement. Conversely, the Landlord argued that it had made repairs whenever leaks arose and hired a professional engineer to identify and remedy the water damage and mold.

The Lease contained certain key provisions, including:

a. Waiver of Claim and Set-Off

> The Tenant hereby waives and renounces any and all existing and future claims, counterclaims, set-offs and compensation against any Rent and agrees to pay such Rent regardless of any claim, set-off or compensation which may be asserted by the Tenant or on its behalf.
>
> 5.2 Rent
>
> To pay the Rent hereby reserved, and all other sums payable hereunder to the Landlord, promptly on the days and at the times and in the manner specified herein, without demand, deduction or set-off.
>
> 8.3
>
> (a) In the event of partial destruction (as hereinafter defined) of the Premises by fire, the elements or other cause or causality, then in such event, if the destruction is such, in the opinion of the landlord's Architect, that the Premises cannot be used for the Tenant's business until repaired, the Gross Rent and Additional Rent shall abate as hereinafter provided to the extent that the Landlord's insurance indemnifies the Landlord.

The Court found the term "Partial Destruction" was defined in article 8 to mean "any damage to the premises less than total destruction (as hereinafter defined) but which renders all or any part of the premises temporarily unfit for use by the [T]enant or the [T]enant's business".

The Tenant's main argument before the Court was that the leaks in the roof made the Premises unusable for its purposes and therefore, entitled the Tenant to abatement of rent. The Landlord argued the abatement provisions of the Lease had no application because the water issues were outside of the contemplation of the scope of the relevant provisions. Alternatively, the Landlord argued, the Lease did not allow for any abatement amounts to be set-off against the rent due and owing.

The Court acknowledged that the issue of damages was not before it, including whether either of the parties had breached the Lease and owed money as a result of any established breaches. Both parties acknowledged that a trial was likely necessary on the issue of damages and specific performance.

In order to determine whether the Tenant could remain in proper possession, the Chambers Judge concluded that it was necessary to determine whether the Tenant was correct in its requirement to pay rent under the Lease being subject to the abatement provisions of the Lease, and that the Tenant was correct in asserting the abatement provisions applied to the facts. The Chambers Judge also found that it was necessary to determine who had the onus of establishing whether the Tenant was wrongfully or properly occupying the Premises.

A. Who Bears the Onus?

According to section 21 of the *CTA*, the Tenant had to show cause as to why it was entitled to continue to occupy the Premises. The Court found that on the evidence the Landlord made out the prima facie case pursuant to section 19 of the *CTA*. It was also determined that regardless of the terms of a consent order, the law under section 21 requires the Tenant show cause as to why it was entitled to occupy the Premises (citing *The Owners, Strata Plan VIS2030 v Ocean Park Towers Ltd*, 2014 BCSC 264).

B. Should this Petition be Converted to the Trial List?

The Tenant relied on *Robertson v Dhillon*, 2015 BCCA 469 ["Robertson"] for the test to convert a petition to trial, which the Tenant argued established that petitions are required to be converted to trials when there are any arguable factual or legal defences to be raised.

According to the Chambers Judge, the matter was not solely related to the possession of the Premises should be referred to the trial list. The Court found that none of the case law provided by the Tenant related to the conversion of the petition for a Writ of Possession brought under the *CTA*. The decision in *Robertson* did not allow for all petitions are required to be converted to trial when there is any arguable factual or legal defence; instead, the rules provide discretion in that regard. In other words, it is for the Court to determine whether there is a legal or factual matter than cannot be determined by petition.

The Court found it could resolve the possession issue between the parties on the basis of the materials at bar in the petition – in other words, it was not necessary to resolve disputed facts; the summary process stipulated by the *CTA* provides a deliberate summary process for determination of possession of commercial premises.

C. Does the Tenant Wrongfully Hold Possession?

The Tenant argued that it was not in breach of the rent provisions of the Lease when it was served with the Notice of Default, or the month after when it was served with the termination, notice to quit, and demand for possession.

According to the Tenant, the Landlord breached the Lease in relation to:

- Quiet enjoyment;
- Duty to perform repairs; and,
- Abatement of rent due to partial or total destruction.

The Court found that the state of the roof and ongoing leaks did not give rise to partial or total destruction under the abatement clauses of the Lease as the language in article 8.3 of the Lease was more limited. The Court found that the Tenant was still able to generate income and the Premises did not become unusable for the Tenant's purposes simply because it may have become less profitable for the Tenant.

The Court noted that in British Columbia, the law regarding commercial tenancies as related to abatement for destruction of premises otherwise unfit for use establishes that "[s]o long as the tenant uses the premises for any of his or her purposes, it is not open to him or her to say that the premises have been rendered wholly unfit" citing, the *CED*, Landlord and Tenant, VII 10.b., Western.

According to the Chambers Judge, the law also established that rent provisions generally take precedence over abatement provisions and that while a tenant may be entitled to an adjustment or damages, the tenant's obligations to pay the prescribed rent in the lease does not extinguish, *Amandon Properties Ltd v Pacific Apparel Inc*, 1990 BCSC 682.

As noted in evidence, the Court found that the Tenant failed to establish an entitlement to unilaterally withhold rent, or to occupy and use the Premises without paying rent. Further, according to the Court, the law established that where a commercial tenant fails to pay rent, when required to do so, and where all of the technical requirements in the *CTA* are satisfied, and a notice to quit has been properly served, the tenant will be wrongfully in possession of the land, and the Landlord entitled to a writ of possession.

On the basis of the evidence before the Court during the petition, the Tenant failed to demonstrate an entitlement to remain in possession of the Premises. Even if the onus was reversed, the Court stated the Landlord established a right to possession of the Premises.

The Judge noted the Tenant still had the ability to apply for and be relieved from forfeiture upon payment of outstanding rent. Costs were not attached to the petition.

Conclusion:

The Court ruled that it could determine the merits of the issue through the within Application and that it was unnecessary to set the matter for the trial list as the summary process contained within the relevant sections of the *CTA* afforded the Court a mechanism for dealing with the dispute. The Court granted the Landlord a Writ of Possession pursuant to the *CTA*, and the Tenant was found to not have a basis for occupying the space.

Jacklin Property Limited v MV Fitness International Inc, 2022 BCSC 126

Facts

This was an application under the first stage of the 2-stage British Columbia process for resolution under its *Commercial Tenancy Act*, at which the petitioner must establish a *prima facie* case.

The Landlord owned a mixed-use commercial building split into units and entered into a lease with the tenant. The tenant made alterations to the premises without the landlord's consent. The landlord informed the tenant that it was in breach of its lease and gave the tenant 10 days to cure the breach by restoring the premises to its original state. The tenant refused to restore the premises to its original state and claimed that the landlord's consent was not required to make alterations. The landlord sent a notice of immediate termination, and the tenant filed a notice of civil claim. The landlord continued to accept rent from the tenant. Lease payment provided by the tenant after termination of the lease or the landlord giving any notice would not, under the lease, extend the rental term or make notice ineffective. The landlord brought an application for an order of possession of the premises occupied by the tenant under the British Columbia *Commercial Tenancy Act*.

Issues

1. Have the procedural requirements of the *Commercial Tenancy Act* been met?
2. Has the petitioner established a triable issue?

Analysis

1. Have the procedural requirements of the C*ommercial Tenancy Act* been met?

The tenant submitted that the landlord's affidavit material was deficient because it did not adequately state the reasons given for the refusal, nor provide any explanation in regard to the refusal.

The Court found that the affidavit material sufficiently disclosed the tenant's reasons given for the refusal, as well as the explanation provided by the tenant to the landlord. The exhibits attached by the landlord included the civil claim, refusal letter, and email correspondence showing the a full picture of the dispute. The Court explained that the requirement to state the reasons is to ensure that the court has adequate notice of the position of the tenant before issuing what could be an *ex parte* order and in the Court's view, the material filed by the landlord in the petition more than adequately addressed this concern.

The Court was satisfied that landlord complied with all of the requirements the *Commercial Tenancy Act.*

2. Has the petitioner established a triable issue?

The tenant's argument was that by accepting rent after the default, the landlord had waived its right to enforce possession.

On a brief review of the case law, the Court found that whether accepting rent after termination constitutes waiver is fact-specific and the law does not necessarily come down one way of the other. On that basis, the Court found that on the affidavit material, and without weighing the evidence, that the landlord had established a triable issue. The facts established a *prima face* case that the tenant wrongfully holds the premises, and that the landlord is entitled to possession.

Further, an article in the lease relied on by the tenant as an authorization to make alterations without consent appeared to be designed to address the tenant's obligation to maintain leasehold improvements, rather than to authorize making of them without landlord's consent.

Held

The Court ordered this matter proceed to an inquiry as contemplated by s. 19 of the *Commercial Tenancy Act* on May 16, 2022, or such other date as agreed to by the parties or ordered by the court.

Conclusion

The tenant had a right under the lease to make changes providing it obtained the landlord's prior written consent and if the tenant breached a condition of the lease, it would be in default and the landlord would be entitled to remedies including forfeiture and possession. A petition hearing was to proceed prior to trial of the civil action.

Paletta International Corp. v. Liberty Freezers London Ltd.; unpublished decision (Ontario Superior Court of Justice, August 26, 2019, D. Parayeski); [2021] O.J. No. 3106 (Ontario Court of Appeal, July 16, 2021, L.B. Roberts, B. Zarnett, and L. Sossin JJ.A.)

The tenant leased premises in a building to operate a commercial frozen food warehousing and distribution business. The landlord agreed to retrofit the premises to accommodate the tenant's business and the parties agreed that the lease would commence when the landlord's work was substantially completed in accordance with the requirements and specifications of the Canadian Food Inspection Agency ("CFIA"). Assuming the landlord's work would be complete by April 2011, the tenant entered into contracts with clients; however, it was forced to cancel those contracts as the work was still not complete by October 2011.

In January 2012, the landlord requested that the parties enter into a new lease with a firm commencement date; however, the new lease included a number of terms not included in the original lease, including requiring that the tenant be indemnified by a third-party and deleting the six months' free base rent period that was originally provided to the tenant. In March 2012, the tenant ultimately refused to sign the new lease and refused to take possession of the premises, arguing that it repudiated the lease on the basis that the landlord was attempting to introduce new material terms and that the landlord failed to complete its work by April 2011.

The landlord commenced an action against the tenant seeking damages for breach of the original lease for the tenant's failure to take possession of the premises. The landlord also began marketing the premises and leased it to a new tenant in June 2013.

The tenant claimed that the lease was not valid and binding because its terms were uncertain because the proposed lease introduced new material terms and because the commencement date of the original lease was not an ascertainable date (as it was dependent on the date when the landlord substantially completed its work). The Court held that because the parties never entered into the proposed lease, its terms did not apply, but that the original lease continued to apply. The Court also held that the commencement date was ascertainable as the date on which the landlord's work would be substantially completed was an ascertainable date, notwithstanding that it was a contingent date. The Court found that the landlord substantially completed its work, and therefore the term of the original lease commenced in April 2012 (based on the Building Code according to a report of project engineers), despite the landlord's work only receiving CFI approval in August 2013.

The Court awarded the landlord with various damages for breach of the lease, including damages on account of lost rental income until the lease with the new tenant commenced in June 2013.

The decision was partially upheld on appeal.

The Court of Appeal found that the Court misinterpreted the lease when it found that the lease commenced in April 2012. The lease provided that the commencement date would occur when the landlord's work was substantially complete in accordance with CFIA requirements and specifications, not merely when it was substantially complete in accordance with the Building Code. The Court of Appeal held that the lease commenced in August 2013, when CFI approval

was attained, rather than April 2012. As a result, the Court of Appeal set aside the landlord's entitlement to damages on account of lost rental income, as the commencement date of the original lease was after the commencement date of the lease with the new tenant.

Beantrends Inc. o/a The Beach Sports Bar & Grill v. 1658277 Ontario Ltd., 2019 ONSC 2646

The tenant leased premises to operate a sports bar. Two perpetrators broke into the premises and started a fire, causing fire and water damage to the kitchen and office areas.

The landlord and the tenant disputed who was responsible for the damage. The lease provided the tenant was to keep the premises in good repair and to maintain all services and equipment. The lease addressed the parties' responsibilities with respect to damage to the premises. Specifically, the lease stated that if damage made the premises "not safe for occupancy" or "unsafe to use or occupy", the landlord must repair the damage with reasonable diligence. The lease also stated that, in such case, the tenant was entitled to a rent abatement until the damage was repaired and it could carry on its business.

Representatives from both parties inspected the damaged property and had differing conclusions as to who was responsible. The tenant argued that the fire made the premises unfit for occupancy, citing aroma of fire accelerant, and the required replacements to drywall and flooring. The landlord argued the damage was contained to the kitchen, and its only repair obligations were for cleaning and repairs for minor damages (which the landlord completed within a few days of the fire). The tenant repaired some other damage at its own cost, seeking recovery and the remainder of the damage to be fixed by the landlord.

The tenant applied to Superior Court to interpret the lease, a declaration that the premises was not fit for occupancy, and for a rent abatement until the damage was fixed.

The landlord argued that its obligation to repair damage that made the premises "not safe for occupancy" or "unsafe to use or occupy" under the lease was not triggered and thus it had no further repair obligations. The landlord also argued that since the tenant undertook its own repairs, the doctrine of "estoppel by convention" prevented it from recovering from the landlord. The doctrine requires: (i) dealings made on a shared assumption, (ii) the parties conducted themselves in reliance on this assumption, and (iii) it would be unjust to allow one of the parties to depart from the assumption.

The Court found that that the landlord's obligation to repair damage that made the premises "not safe for occupancy" or "unsafe to use or occupy" under the lease was triggered, and the only real issue was the extent to which it was engaged. Further, the Court could not accept the argument that the tenant's maintenance and repair obligations under the lease somehow trumped the landlord's repair obligations under the lease to the extent it applied.

The Court also found that the tenant was entitled to abated rent. The Court noted that while the landlord's minor repairs in the days after the fire may have addressed the issue of whether the premises was "unsafe to use or occupy", the lease also stated the landlord's obligations were to make the premises "fit for occupancy" to the point the tenant "can carry on its business therefrom". The Court found that the landlord's initial repairs did not meet this threshold.

The Court further found the landlord's "estoppel by convention" argument untenable. As mentioned above, the doctrine requires: (i) dealings made on a shared assumption, (ii) the parties

conducted themselves in reliance on this assumption, and (iii) it would be unjust to allow one of the parties to depart from the assumption. The landlord argued: (i) in completing its own repairs, the tenant created the assumption it would be responsible for those repairs; (ii) the landlord deferred bringing an action for breaching the lease and payment of rent based on that assumption; and (iii) it is unfair to allow the tenant to depart from the assumption.

The Court found the communications between the parties did not create a mutual assumption. Notwithstanding an email from the tenant was undertaking its own "re-opening work", the tenant's lawyer gave formal notice to the landlord of its intention to recover the costs the very next day. Therefore, the Court could not accept the argument that the landlord relied on the tenant's first email to its detriment, given the tenants formal position was conveyed almost immediately after.

The tenant obtained a declaration requiring the landlord to make the necessary repairs, and offer the tenant a rent abatement until the work was complete.

PC Bang Pacific Theatre Ltd. v Klar Enterprises Inc, 2019 BCSC 759

Facts:

The plaintiff, PC Bang Pacific Theatre Ltd. (the "**Tenant**"), owned and operated an internet gaming business using equipment and software (the "**Business**"). The Business was owned equally by Mr. Gord Haddrell ("**Mr. Haddrell**") and Mr. Brendan Pickering ("**Mr. Pickering**"). On May 11, 2011, the Tenant entered into a lease (the "**Lease**") with the defendant, Klar Enterprises Inc (the "**Landlord**") for a location on Highway 33 in Kelowna (the "**Premises**"). The Lease provided for base rent of $7,000 per month, except for the first month, in which only additional rent of triple net charges, but no base rent, was to be charged.

Mr. Haddrell began undertaking renovations on the Premises, during which he discovered asbestos in the flooring requiring additional work to be completed (the "**Asbestos Remediation**"). Mr. Haddrell obtained three quotes and decided on pursuing one option at cost of $15,120 and which delayed the opening of its business by approximately 20 days. The Tenant did not pay for any rent in June or July, and refused a rent reduction of $2,000 from the Landlord after explaining the cause for the rent arrears. After the August rent went unpaid, the Landlord attended the Premises again and Mr. Haddrell provided the Landlord with five post-dated cheques of $2,500 each. The first two were honoured in August, but the third was returned for insufficient funds.

In August 22, 2011, Mr. Haddrell proposed a payment plan to catch up on rent arrears by October 1, 2011, in which he acknowledged the July rent arrears and made no mention of rent offset nor the Asbestos Remediation.

On September 8, 2011, Mr. Haddrell sent an email to the Landlord stating that the Tenant would make an immediate payment of two month's rent in exchange for a rent credit granted by the Landlord equal to the costs related to the Asbestos Remediation. Mr. Haddrell had not obtained authority from Mr. Pickering to make these promises. An additional email was sent on September 11, 2011 from the Tenant which offered an immediate payment of rent of $7,000 with Mr. Pickering's credit card information (the "**Credit Card**") and $15,120 for the Asbestos Remediation.

The Landlord processed the $7,000.00 payment on the same day, September 11, 2011. In the following days, Mr. Haddrell submitted receipts for the Asbestos Remediation and the Landlord tallied the applicable taxes which could be claimed back.

Approximately two weeks later, Mr. Pickering noticed another $7,000 had been charged to the Credit Card on September 12, 2011. Around the same time, the Landlord sent a letter demanding that outstanding arrears be paid right away, and made it apparent that the Landlord would not be providing an offset in the amount outstanding.

On October 3, 2011, the Landlord sent an email advising of an intention to charge the full amount of the October rent to the Credit Card. Mr. Haddell immediately responded that the Landlord had no authorization to process further transactions on the Credit Card. Despite this, the Landlord made three further charges to the Credit Card over the course of the next two months. Mr. Pickering had disputed and reclaimed $7,000 of charges directly with the Credit Card provider. The Landlord

later conceded at trial that $30,453 which had been charged to the Credit Card had not been authorized.

On December 20, 2011, the Landlord learned that its charges were being disputed and emailed Mr. Haddrell threatening eviction unless all arrears were paid by December 22, 2011. By this point, Mr. Pickering had intentions to reverse all charges to the Credit Card and instead put the money in trust until accounting could be completed and the disputed rent arrears arbitrated. On January 5, 2012, the Landlord attempted to lock the Tenant out of the Premises but was physically prevented from doing so by Mr. Haddrell.

On January 10, 2012, Mr. McPhail (the "**Bailiff**") attended the Premises with a warrant of seizure and a notice of seizure, both indicating that the Tenant owed $45,144.56, which assumed that all the Credit Card charges would be reversed. Mr. Haddrell refused to sign any paperwork presented by the Bailiff and the Bailiff proceeded to seize substantially all of the property located at the Premises (the "**Seizure**"). The Landlord sold all the assets at an auction, but received no net profit from the sale.

Following the Seizure, the Landlord continued to resist Mr. Pickering's complaints regarding the charges to the Credit Card and suggested through an email to the Credit Card provider that Mr. Pickering had authorized the transactions. In the end, Mr. Pickering was successful in obtaining a return of a further $7,000.00 but the Landlord retained the remaining $23,453.00.

The Tenant allege that, due to the charges made to the Credit Card and the offset which they were entitled to, no rent was owed and distraint was illegal. In the alternative that some rent was owed, the Tenant argued that the distraint was excessive. In the further alternative, the Tenant argued that the Seizure constituted a termination of the Lease and the right to distrain was lost. The Tenant sought damages for the loss of business and punitive damages for the unauthorized use of the Credit Card.

The Landlord argued that it never agreed to an offset and that the Tenant remained responsible for any costs associated with improvements to the Premises. The Tenant were in default of the Lease for a failure to pay rent and therefore the distraint was lawful. The Landlord denied there was any termination of the Lease prior to the Seizure and argued that, even if distraint were improper, the Plaintiff failed to establish any business value and thus suffered no compensable loss.

Issues

1. Did the Tenant owe any rent as of the date of the Seizure?
2. Was the Lease terminated by the Bailiff during the Seizure?
3. What are the Tenant's damages?

Held

1. *Did PC Theatre owe any rent as of the Seizure Date?*

The Court determined that the Tenant were obligated to have paid rent up until the date of the Seizure in the amount of $50,400. It was agreed that the Tenant were entitled to credit for the initial deposit paid with the Credit Card and the two post-dated cheques provided by Mr. Haddrell in August 2011.

The Court then addressed whether the Landlord agreed to a rent offset. The Court relied on *Wu v. Sun-Gifford*, 2001 BCSC 191 to determine that the emails between the parties provided the best indication of the events that occurred.

The Court then found that the parties had intended the Tenant's email on September 11, 2011 to be an offer. Considering Seaport Crown Fish Co. v. Vancouver Port Corp. (1997), 47 B.C.L.R. (3d) 78, the Court found that the Landlord had consented to the offer through its conduct, and rejected the Landlord's argument that it had understood the Credit Card was to be used for future rent. The timing of the Landlord's subsequent charges to the Credit Card indicated that it knew it did not have the authority to do so.

After considering *Terrien Bros. Construction Ltd. v. Delaurier*, 2006 BCSC 1645 at para. 37, the Court had to determine whether, in the eyes of an objective bystander, the parties knew of a possible claim and whether they reached a compromise. The Court found that the Tenant's offer of an offset and the Landlord's request for receipts indicated by conduct that the parties were aware that an offer was being made. Further, the Court found that the Landlord had accepted the offer when it charged the $7,000.00 amount to the Credit Card. Therefore, the Tenant is entitled to a rent credit of $15,120.00 as per the agreement between the parties.

Although Mr. Pickering had received two reimbursements of $7,000.00 each from the Credit Card provider, the Landlord had not yet received a demand to repay the amounts. Therefore, the Court found that the Landlord had retained the full $37,453.00 amount that had been charged to the Credit Card as of the date of the Seizure. The Court ruled that this amount must be treated as rent received.

As such, the Court concluded that the Landlord had received an amount which exceeded the rent due from inception to the date of Seizure by $4,915.00. As no rent was owed by the Tenant, the Seizure was therefore illegal.

2. *Was the Lease terminated by the Bailiff during the Seizure?*

Although the distraint was deemed illegal by the Court, the Court continued its analysis of this issue. After considering the somewhat contradictory evidence that was given by the Bailiff and the Mr. Haddrell, the Court accepted the Bailiff's version as the Mr. Haddrell had significant inconsistencies which undermined his credibility. The Court found that the Bailiff had not denied customers access to the Premises, nor were those present told to leave. The Tenant were not denied access to the Premises following the seizure and had actually accessed the Premises on more than one subsequent occasion. Although the Bailiff had inadvertently destroyed the main server, which was potentially the most valuable asset on the Premises, the Tenant had not attempted to access the server following the Seizure and, once he regained access to it, did not inspect it within a reasonable amount of time. Considering these factors, the Court concluded that the Bailiff did not terminate the Lease in the way it engaged in the Seizure process.

3. *What are the Tenant's damages?*

The Court considered *Ker-Mar Enterprises Inc. v. Sunsan Enterprises Inc.*, [1996] B.C.W.L.D. 3056 to determine that the Tenants were entitled to use a methodology which valued their Business,

but were not entitled to apply multiple methodologies which would have resulted in the Tenants being compensated twice for the value of their assets. The Court adopted *Soleil Hospitality Inc. v. Louie*, 2010 BCSC 1183 to determine that, where the actions of a wrongdoer make it difficult or impossible for an innocent party to prove its damages in a normal manner, the Court must make every reasonable presumption in favour of the innocent party.

However, the Court considered that the Tenant had not disclosed their bank statements until the eve of trial, despite these documents being highly relevant. Second, Mr. Haddrell had taken physical business records on the day of Seizure which it had not disclosed. Finally, the Court found that Mr. Haddrell had allowed its own expert to conclude that business records on the server were unattainable, when in fact Mr. Haddrell had reacquired the server and did not know, at the time, that it had been destroyed.

Comparing two methods of determining the value of the Tenant's Business, the Court determined that the value of the Business on the date of Seizure would be based on an alternate, prior location of the Business, taking into account the capital expenditures, a discount rate, a mid-year present value approach, subcontractor expenses, and actual profitability of the Business. Considering an expert report prepared by the Tenant's expert, which were adjusted for additional factors set out by the Court, the Court ruled that the Business was valued at $125,000.00.

The Court, citing *Gastown Investment 21 Ltd. v. Purple Onion Cabaret Inc*., 2005 BCSC 1029, noted that intellectual property, as intangible property, could not be seized as part of a distraint. The Tenant had alleged that it had paid a total of $176,500.00 for intellectual property which it had lost when the server was destroyed. However, the Court found that the server had not been destroyed or damaged while in the Bailiff's possession or control. The server could be accessed using a password, which a former employee of the Tenant could provide. Thus, the Court concluded that the Tenant failed to establish that the software was lost as a result of the Landlord's actions, and had not proven that it had any commercial value.

Mr. Haddrell alleged that a separate company, PC Bang Ltd ("**PCB**"), of which he was owner, was the actual owner of some of the property which the Bailiff had removed in the Seizure. The Court considered sections 3(2) and 3(6)(a) of the *Rent Distress Act* as follows (para 171):

> 3(2) A landlord must not distrain for rent the personal property of a person except that of the tenant or person who is liable for the rent, although that property is found on the premises.
> 3(6) A landlord is not liable for the distress of personal property to which the restriction in subsection (2) applies, unless
> (a) the owner of the property makes a statutory declaration containing an inventory of the property and alleging that it is his or her property and that the person who is liable for the rent has no right or interest in the property.

The Court noted that, pursuant to these sections, a landlord can lawfully distrain the chattels of a non-party to the lease as long as the non-party fell into one of the above categories. Following the distraint, Mr. Haddrell provided a statutory declaration that PCB was the owner of a list of property seized, but did not assert that the Tenant had no interest in the property. Following the authority

of *Alliance Marble & Granite Ltd. v. Molti Ventures Inc*., 2003 BCSC 387, the Court held that a deficiency in one of the requirements was fatal to the enforceability of a declaration. As such, the Court found that PCB had no separate claim to the assets seized by distraint.

Finally, the Court applied *Whiten v. Pilot Insurance Co.,* 2002 SCC 18 (S.C.C.) to conclude that punitive damages were justified against the Landlord as its actions of intentionally processing over $30,000.00 of unauthorized additional charges to the Credit Card were sufficiently high-handed and malicious. As such, it awarded $50,000.00 in punitive damages against the Landlord.

Conclusion

As the Landlord's distraint was deemed illegal by the Court, the Tenant was awarded $125,000.00 for the value of the business, plus $50,000.00 in punitive damages for continuing to withdraw funds from the Credit Card with knowledge it had no authority, and $4,915.00 in rent adjustments against the Landlord. The Court directed that, if either of the parties wished to speak to costs, they may make arrangements to appear again within 21 days from the date of the Court's judgment.

Kim v Kim, 2019 BCSC 222

On June 2, 2009, the Tenant was locked out of her restaurant (the "**Premises**") by the Landlord for late payment of rent one day after her rent was due. Less than two months later, a fire destroyed the building.

The Tenant argued that her lease was breached and sought damages for the value of her business and lost inventory. The Landlord agreed that it had locked the Tenant out of the business prematurely, but argued that the Tenant suffered no losses as its business had no value and the Tenant failed to mitigate losses by failing to remove any inventory or equipment of value prior to the Fire.

Issues:

1. Did the Landlord wrongfully terminate the Lease?
2. If so, did the Tenant prove it suffered losses caused by the wrongful termination of the Lease, particularly:
    a. Did the Tenant establish any such damage or losses, and in what amount?
    b. Was the Landlord's wrongful termination of the lease the cause of the Tenant's losses?
3. If so, had the Landlord established the Tenant failed to mitigate some or all of those losses by failing to remove its inventory, equipment, and other moveable improvements?

Held:

1. Did the Landlord wrongfully terminate the Lease?

The Landlord conceded that terms of the Lease provided for repossession of business premises only after 15 days of rent being unpaid pursuant to the *Lands Transfer Form Act*, RSBC 1996, c. 252, and that repossession of the Tenant's restaurant occurred one day after rent was unpaid. While the Landlord did not concede that it breached terms of the Lease, it did not provide any legal grounds or justification for repossessing the premises one day after rent was due contrary to provision.

On this basis, the Court ruled that the Landlord wrongfully repossessed the Premises on June 2, 2009 when it locked the Tenant out of its business.

2. If so, did the Tenant prove it suffered losses caused by the wrongful termination of the Lease, particularly:

a. Did the Tenant establish any such damage or losses, and in what amount?

The Tenant alleged damages of approximately $350,000 and stated that the value of its business was between $173,000 and $198,000, and the loss of equipment was another $150,000.

On the evidence, the Court found that the Tenant's business was operating at a consistent loss, that it had a very significant long-term debt, and that the stated value of assets in its financial statements

with respect to goodwill, equipment, and leasehold improvements were mostly taken from purchase amounts created in 2005, which did not reflect the values in 2009. The Court noted that the Tenant's financial statements were not audited, which affected the amount of weight given to them by the Court.

The Tenant alleged that it had been trying to sell its business and to have its Lease assigned. Both parties agreed that no offer to purchase was made for the business at all, and the Tenant could not provide evidence that any offers were made or any direct knowledge of inquiries to the Landlord regarding assignment of the Lease.

Instead of using the Tenant's financial statements to value its equipment, which reflected the equipment value in 2005 without depreciation for their four years of use, the Court found that the best value of the equipment was an appraisal prepared by an auctioneer and appraiser in 2010 listing the value of the equipment that the Tenant had claimed had been taken from the Premises by the Landlord. This equipment was valued at $6,505.00.

Further, the Court calculated inventory at $12,000.00 at the time the Tenant was locked out of its Premises relying on the Tenant's financial statements, as the Tenant stated that all of its records were destroyed in the Fire. The Court accepted this amount after considering that it had been reported consistently over the course of the operation of the business.

b. Was the Landlord's wrongful termination of the Lease the cause of the Tenant's losses?

After considering *Dosanjh v. Liang*, 2015 BCCA 18 and *Rougemount Capital Inc. v. Computer Associates International Inc*, 2016 ONCA 847, the Court found that the Tenant's damages crystallized at the time of wrongful termination of the Lease on June 2, 2009, and that the fire was not a factor in assessing her losses for the purposes of the breach of the Lease.

The Court found that the Landlord's wrongful termination of the Lease was the initial cause of the Tenant's loss, and thus the Landlord was responsible for the Tenant's loss of inventory, equipment, and the value of its leasehold improvements, subject to the Tenant's duty to mitigate.

3. If so, had the Landlord established the Tenant failed to mitigate some or all of those losses by failing to remove its inventory, equipment, and other moveable improvements?

The Court found that the Landlord had given the Tenant the opportunity to remove its equipment and moveable leasehold improvements. These items constituted the majority of the Tenant's leasehold improvements, but the Tenant failed to remove these and as such failed to mitigate its losses.

The Court further found that, in the two-week period that the Tenant had been locked out before it had access to remove its goods, some of its inventory would have spoiled due to the nature of its business as a restaurant. The Court assessed the Tenant's loss of inventory at $10,000, taking into account that some portion of its inventory was alcohol and dry goods that should have been recoverable.

Finally, after considering *Ross v. Whitson*, 2001 BCSC 941, the Court awarded the Tenant $15,000 in general damages for the wrongful termination of its lease. The evidence established that the Landlord wanted the Lease to end for reasons beyond difficulty in collecting rent, as it had received an offer to purchase the Premises subject to the end of the Lease.

Conclusion:

The Landlord was ordered to pay $25,000 in damages for wrongfully breaching the Lease which led to the Tenant's loss in inventory.

Freshslice Properties Ltd. v Theepan Food Industry Ltd., 2021 BCSC 1939

Facts

This was a summary application under British Columbia's *Commercial Tenancy Act*, RSBC 1996, c 57.

In 2012, the respondent franchisee entered into a franchise agreement and sub-sublease of a commercial premises with the petitioner franchisor. Under the franchise agreement, the franchisee was required to use the premises only for operation of the franchise restaurant and to refrain from engaging in any similar or competing business within five kilometres during and for two years after termination. In 2021, the franchisor learned that the franchisee had rebranded the premises as a competing business. The franchisor served a notice of termination of the franchise agreement and sub-sublease. The franchisee refused to vacate the premises on the basis that franchisor had, in 2015, implemented a new policy requiring franchisees to lease the premises directly from landlords. The franchisee had entered into a new lease directly with the landlord in 2019, ostensibly with the agreement of the franchisor. The franchisor applied pursuant to the *Commercial Tenancy Act* for declaration that the franchisee was wrongfully in possession of the premises and for a writ of possession.

Issue

1. Is this matter suitable for the summary procedure under ss. 18-21 of the *Commercial Tenancy Act*?

Analysis

The Court held that the issues in dispute between the franchisee and franchisor were not suitable for determination under the summary process established in the *Commercial Tenancy Act*.

The key issue for determination was whether the sublease and the sub-sublease continued to apply to the franchisee's occupation of the premises.

The Court determined that this issue raised complex factual and legal issues that could not be determined on the evidentiary record because if the head lease was not terminated, then the landlord of the premises could not have granted a lease to the franchisee. A clear factual contradiction was present in the evidence regarding whether the franchisor had surrendered its rights under the sublease and consented to the landlord entering into a lease directly with the franchisee. There was nothing in writing with respect to a release or termination of the head lease.

There was also an issue about what, if any, obligation the franchisee had to notify the franchisor of a change in leasing arrangements for the premises and whether it was free to enter into a new lease without notifying the franchisor. The Court found that those factual and legal issues were not suited to the summary process under the *Commercial Tenancy Act* and could not be decided on the current evidentiary record. They are best decided after disclosure, discoveries, and on a full evidentiary record.

Held

As a result, the Court dismissed the petition, leaving the issues to be determined either at trial of an action for possession of the Premises, and/or as a part of the litigation commenced under the franchise agreement. Having reached this conclusion, the Court found it unnecessary to address the respondent's remaining arguments.

Hudson's Bay Company ULC v Oxford Properties et al, 2021 ONSC 4515

The tenant stopped paying rent to the landlord during the COVID-19 pandemic. Seven months later, the landlord terminated the lease.

The tenant sought relief from forfeiture pursuant to section 20(1) of the *Commercial Tenancies Act* (Ontario) (the "CTA"), which allows a court to grant relief and reinstate the lease "having regard to the proceeding and the conduct of the parties … and to all other circumstances, the Court thinks fit, and on such terms as to the payment of rent…".

The tenant argued was that section 20(1) of the CTA entitled the Court to prescribe a rent abatement and to reinstate the lease. The tenant argued that its conduct as a model tenant, alongside the unprecedented impact of the pandemic, should be considered in determining whether it was entitled to relief from forfeiture.

The tenant also argued that the landlord breached the lease by failing to provide a first-class shopping centre as required. During the COVID-19 pandemic the landlord either closed the premises or placed capacity restrictions in accordance with governmental restrictions.

The landlord argued that it could not be in breach of the lease as a result of its compliance with provincial laws. The landlord claimed that limiting capacity or closing the premises in accordance with the governmental restrictions in effect at the time did not equate to a breach of the lease.

The Court agreed with the landlord and found that the landlord was not in breach of the lease for failing to meet operating standards. The Court held that "making such a finding would lead to a commercial absurdity in that the [l]andlord would be put in a position of having to ignore provincial laws and public health guidelines in order to maintain what [the tenant] determined was a first-class mall".

The Court found that the tenant was required to pay rent without deduction, abatement or set-off. However, the Court granted the tenant interim relief from forfeiture, reinstating the lease and allowing the tenant to defer some of its rent, but ultimately pay all arrears with interest.

Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI v. Oxford Properties Retail Holdings II Inc., 2022 ONCA 585

The tenant stopped paying rent to the landlord during the COVID-19 pandemic. Seven months later, the landlord terminated the lease. The tenant sought relief from forfeiture pursuant to section 20(1) of the *Commercial Tenancies Act* (Ontario) (the "CTA").

The tenant argued that section 20(1) of the CTA entitled the Court to order a rent abatement and to reinstate the lease, and that the landlord breached the lease by failing to provide a first-class shopping centre as required.

The landlord argued that it could not be in breach of the lease for complying with provincial laws during the pandemic (which included limiting capacity or closing the premises).

The Court granted the tenant interim relief from forfeiture and ordered the tenant to pay 50% of its unpaid arrears and 50% of its monthly rent as it came due.

The tenant appealed to the Ontario Court of Appeal and the landlord cross-appealed. The issue on appeal was the scope of the remedy of relief from forfeiture.

The tenant's argument was that the "very broad language of section 20(1) [of the CTA] contemplates a wide range of remedies, including rent reductions, abatements and deferrals." It argued that, due to the impact of the pandemic, it should have been entitled to an abatement or reduction in rent for some indefinite time while the economic impact of the pandemic continued.

The landlord argued that "relief from forfeiture was not intended to permit a court to rewrite the commercial bargain made by the parties to take into account unforeseen events that have had a negative impact on the tenant's business". The tenant was able to make all the payments the Court required.

The Ontario Court of Appeal dismissed the appeal. It found that granting a rent reduction or abatement as a term of granting relief from forfeiture was inconsistent with the rationale underlying the remedy. The remedy applies to protect a tenant from termination of the lease but does not extend to rewriting the lease on more favourable terms to the tenant such as rent abatements or reductions.

The landlord's cross-appeal dealt with whether the motion judge erred in deferring the tenant's rent payments as a term of granting relief from forfeiture.

The Ontario Court of Appeal held in favour of the landlord and found that the motion judge erred in deferring the tenant's rent payments for reasons unrelated to the tenant's ability to comply with the terms of the lease relating to rent payment. The rent deferral was not intended to give the tenant additional time to pay its rent arrears but was intended to mitigate the economic impact of the pandemic. The tenant was able to pay the arrears and should have been ordered to pay them.

The landlord was successful on both the appeal and its cross-appeal.

Galt Machine & Plating Inc. v. MLS Group Ltd., [2021] O.J. No. 6947 (Ontario Superior Court of Justice, December 10, 2021, M. Sharma J.)

A commercial tenant commenced an application to recover possession of the premises. The landlord had locked the tenant out for failing to pay a security deposit when due under the lease.

The landlord sent a notice of default (by e-mail and registered mail) demanding payment of the Security Deposit.

Negotiations followed by phone, at which time the landlord said that it would accept the security deposit in three equal installments.

In a subsequent e-mail to the tenant, the landlord summarized the agreement between the parties and then advised that "If the cheques are not available on those days or they bounce, the tenant will immediately owe the balance of the unpaid funds".

The Landlord accepted payment of the Tenant's monthly rent; however, the Tenant failed to make payment on the first installment of the security deposit payment.

The Landlord sent a notice of default (by email), demanding delivery of the full security deposit. The notice said the security deposit constituted Additional Rent, and non-payment amounted to a default.

The security deposit remained unpaid, therefore the landlord locked the tenant out of the Premises.

The tenant relied on a body of cases (standing for the proposition that "a landlord who has the right to forfeit a lease by reason of the tenant's default may waive the exercise of such right when, after the act or omission giving rise to the right has come to its knowledge, it does any act whereby it recognizes the relationship of landlord and tenant as still continuing") to argue that when the security deposit was not delivered and the Landlord sent the first notice of default demonstrating that it was aware of same, and subsequently accepted rent, the Landlord waived any rights it had to terminate the lease for the tenant's failure to pay the security deposit.

However, the court rejected that submission entirely, finding that the landlord had not waived the right to terminate the lease. The Court noted that the agreement that the tenant would pay the security deposit in three installments was entered into before the rent fell due. Therefore, that agreement created a new possibility for a defaulting event (i.e., the non-payment of the any of the three equal installments of the security deposit), but the earliest any such defaulting event could occur was after rent was paid. Therefore, unlike in the body of cases relied upon by the tenant, in this instance, the original default was never passed over by the landlord by way of the acceptance of August rent.

Next, the Tenant argued that the agreement that the tenant would pay the security deposit in three installments (which was not in writing and not signed by the parties) did not represent a valid amendment to the lease and it pointed to the entire agreement clause in the lease for support. But the Court rejected that argument too finding that the parties, by their conduct and oral agreement,

intended to amend the lease such that the entire agreement clause no longer represented their intentions; the Court noted that this conclusion is commercially practical.

Despite the foregoing findings, the Court went on to consider whether proper notice was given under the lease and found that it was not, because the landlord failed to give the tenant the proper cure period prescribed in the lease.

Recognizing that courts do not look favourably upon forfeitures and "will take advantage of even trifling reasons to avoid upholding them" the Court found that the landlord's possession of the premises was premature and unlawful.

The Court therefore ordered that the landlord give exclusive possession of and access to the premises to the tenant in accordance with the lease.

Northwinds Brewery Ltd. v. Caralyse Inc., [2021] O.J. No. 6671 (Ontario Superior Court of Justice, November 26, 2021, J.R. McCarthy J.)

A commercial tenant commenced an application following threats of immediate lock out from the landlord. The purported bases of default fell within three categories (and were all raised for the first time soon after the tenant had exercised its option to renew the term):

(1) The "rentable area of the premises as defined in the lease (which the landlord insisted were comprised of 5,600 square feet vs. 5,106 as the tenant had measured);
(2) Alterations/additions to the premises (which the landlord insisted were "structural" in nature and required approval by the landlord under the lease); and
(3) The historical and future TMI (the former of which the landlord insisted the tenant had arbitrarily withheld for several years). In support of this item, the landlord provided TMI statements (which had never been delivered to the tenant before then).

With respect to the rentable area of the Premises, the before the commencement date the tenant had the rentable area of the premises measured but not certified. It delivered the uncertified drawing to the landlord and the landlord did not challenge the lack of certification at the time. After renewing the lease, the landlord challenged the lack of certification with respect to the tenant's measurement for the first time.

With respect to alterations/additions, during the fixturing period, the tenant constructed an internal mezzanine for storage and a removable wooden enclosure to conceal and protect its expensive external ground level machinery. The landlord argued that this work was "structural" in nature and required the landlord's prior written approval, which the tenant did not obtain.

With respect to historical and future TMI, the landlord argued that the tenant had failed to pay the amounts owing under the 2015-2017 reconciliation statements (which the tenant argued that it had never received).

In addition, although the landlord estimated TMI for 2019, the tenant continued to pay TMI as estimated in the first year of the term (given its allegation that the landlord had never estimated TMI or delivered reconciliation statements for the years 2015-2018 as stipulated in the lease) alleging that the 2019 estimate was invalid.

With respect to the rentable area of the Premises, the Court found that there had been reliable evidence the premises were comprised of 5,106 square feet since before the commencement of the term. Although the drawing delivered by the tenant had not been certified, the court was of the opinion that the tenant was lulled into the belief that the landlord accepted the non-certified drawing at the time and was prepared to accept rent on that basis.

The Court noted that the word "structural" was not defined in the lease; but it noted that "[i]n the context of a commercial lease, [a structural element] has been described as, "one which is necessary to hold the building together, such as foundations, walls, roofs and floor, as opposed to an element which is necessary only for the use made of the building such as internal walls, stairways and windows or merely decorative such as carpeting, mirrors, murals and planters."

Based on the foregoing, the Court concluded that neither the internal mezzanine, nor the external enclosure, were structural in nature and that neither required approval from the landlord.

The Court found the landlord's notices of default were invalid as was the estimated TMI for 2019. The Court found that the landlord had a mandatory, strict, ongoing, annual obligation to provide a statement of taxes and operating costs to the tenant failing which the tenant's proportionate share of operating costs and taxes for the previous year remained unchanged. The tenant's decision to pay TMI as estimated for the first year of the term did not put the tenant in default of the lease because that was all the landlord was owed (given its own failure to comply with the lease).

Blue Health Consultants Inc v Blue Health Services Inc, [2021] O.J. No. 2016 (Ontario Superior Court of Justice, April 16, 2021, L.A. Pattillo J.)

The tenant leased premises from the landlord. The principal of the landlord-corporation owned 25% of the common shares of the tenant-corporation. The tenant was a medical facility operated by a privately held corporation.

The landlord terminated the tenant's lease on the alleged grounds that the tenant was in arrears of rent and locked the tenant out of the premises. The principal of the landlord-corporation, in his capacity as a shareholder of the tenant-corporation, took out the sum allegedly owed in rent arrears from the tenant-corporation without authorization.

The tenant-corporation's majority shareholders brought an application for an interim order to restore the tenant's access to the premises.

The landlord claimed that the tenant was in arrears of rent and therefore the landlord was entitled to terminate the lease. The tenants disputed this. Aside from the internal issues being experienced by the shareholders of the tenant, the tenant argued that the landlord's receipt of financial assistance under the *Canada Emergency Commercial Rent Assistance* program entitled the tenant to rent credit. Further, the tenant asserted that because it was entitled to a rent credit under the *Canada Emergency Rent Subsidy* (CERS) it was not in arrears.

The tenant also argued that it was entitled to protection from eviction under the *Commercial Tenancies Act* (CTA); as the CTA prohibited landlords from evicting tenants approved for CERS. The tenant argued that the landlord locking them out was a violation of the CTA.

Court awarded an interim order restoring the tenant to the premises. The Court found that there was sufficient evidence to show that the landlord knew that the tenant was eligible for the CERS program and had applied for same. More importantly, the Court noted that, due to the moratorium on evictions under the CTA, the landlord was prohibited from terminating the lease when it did. The tenant was allowed to continue operating its business from the premises.

Manofmizpeh v Ng, 2022 ONSC 1113

The tenant leased premises from the landlord to operate a Jamaican restaurant. The landlord and tenant disputed over repair and maintenance obligations. The landlord and tenant also disputed whether the agreement to lease or the final lease governed the relationship.

The tenant argued that the landlord had not fulfilled its repair obligations. It then refused to pay rent from the commencement date in January 2016 until May 2016 when the Court issued an interim order for the tenant to pay rent until the dispute was settled. The tenant also changed the locks to the premises. The landlord terminated the lease but could not get access to the premises.

The tenant requested an injunction for the landlord to conduct repairs, a setoff against the costs of conducting its own work against any arrears, and relief from forfeiture. The landlord counterclaimed seeking summary judgment for arrears, a determination that the lease was at an end, and an eviction order against the tenant.

The agreement to lease provided the tenant with a four-month rent-free period, during which it would complete its own improvements to the premises. It also provided that the landlord was to repair previous damage to the premises before the commencement date. A final lease was then executed in July 2019, which provided the tenant to pay additional rent and utilities during a four-month rent-free period. The final lease also provided the tenant was to maintain interior, above-ground pipes, sewage, and drainage pumps.

The Court had to determine (i) the proper agreement governing the landlord and tenant relationship, (ii) any breaches of said agreement, and (iii) whether the tenant should be granted relief from forfeiture.

The Court found that the final lease applied. The tenant argued that the landlord and tenant entered a verbal agreement to reduce the amount of additional rent payable during the rent-free period to $7,000. Evidence showed there were negotiations about reducing additional rent during the rent-free period in exchange for the tenant assuming the landlord's repair obligations. However, the tenant never signed the rider detailing this arrangement sent by the landlord. The tenant then argued the verbal negotiations rescinded the final lease in favour of the agreement to lease, which did not explicitly provide additional rent was payable over the rent-free period. The Court found the evidence did not support an intention to revert to the terms of the agreement to lease. The lease was negotiated and executed through counsel and rent is a central term in all tenancies. The tenant could not now argue that the inclusion of additional rent during the rent-free period was included by "mistake".

The Court then found that the tenant breached the lease, and the landlord was entitled to treat the lease at an end. The tenant breached by refusing to pay rent between January 2020 and May 2021. Moreover, changing the locks was expressly prohibited under the lease, and effectively preventing the landlord from exercising the remedy of distraint. The Court found this to be a fundamental breach. The Court also found no breach on the part of the landlord. Evidence showed that it completed its repair obligations. It could not inspect any other repair requests in a timely manner

since it was locked out of the premises. Consequently, the Court did not grant the tenant its requested injunction.

Finally, the Court found the tenant was not entitled to setoff or relief from forfeiture. The Court refused setoff as the repair invoices supplied by the tenant as evidence showed the repairs were the tenant's responsibility according to the final lease. The Court denied relief from forfeiture as the tenant did not come to court with "clean hands"; that is, one cannot ask for an equitable remedy having also acted improperly under the circumstances. Here, the tenant failed to pay utilities to the point it was added to the landlord's property tax bill, and it never even set up the account; it refused to pay rent for over 16 months and only did so when the Court ordered; and it changed the locks unilaterally, preventing the landlord from entering the premises. The Court held that it was unfair to further defer the landlord from getting back its property.

The Court granted the landlord's motion for summary judgment for damages of $298,659.12, a determination that the lease was at an end, and an order evicting the tenant.

Campbell v 1493951 Ontario Inc, 2020 ONSC 4029 (Ontario Superior Court of Justice, June 29, 2020, Justice B. Davies), upheld on appeal in 2021 ONCA 169 (Ontario Court of Appeal, March 19, 2021, Justice P. D. Lauwers, Justice G.T. Trotter and Justice B. Zarnett)

The subtenant subleased premises from the tenant under an oral sublease. The subtenant used the premises to operate a cannabis store without a license or any valid exemption from the licensing requirements under the *Cannabis Control Act, 2017* or the *Cannabis License Act, 2018*.

The tenant's lease required any business conducted on the premises to comply with federal, provincial and municipal law.

After purchasing the property, the landlord delivered notice to the tenant that it was in breach of its lease because the premises were being used for the sale and distribution of cannabis without a license. The notice provided the tenant ten days to remedy the breach, failing which the landlord was prepared to terminate the tenant's lease and repossess the premises, which in turn would also terminate the subtenant's sublease.

The subtenant continued its operations until six months later, when the police raided the premises and the landlord terminated the lease and retook possession. The landlord had accepted rent from the tenant during the six-month period and did not issue a fresh notice of default before re-entering the premises.

The Court was tasked with determining whether the landlord's delay in acting pursuant to the default notice and the subsequent acceptance of rent during such delay amounted to a waiver of the breach, and therefore required the landlord to issue fresh notice prior to terminating the lease.

The Court reiterated that a notice of default under the *Commercial Tenancies Act* must: (1) specify the breach alleged; (2) require the tenant to remedy the breach, if possible; and (3) give the tenant a reasonable period of time to remedy the breach.

After receiving the default notice, the subtenant repeatedly reassured the landlord that it held a valid exemption to operate without a license. The Court found that the subtenant had misled the landlord into believing that the subtenant had a valid exemption and could lawfully operate a cannabis store without a licence. The Court determined that the landlord did not terminate the lease during that six-month period in reliance on such misleading information, believing the breach to have been cured. The Court found that once the landlord found out that the breach (operating a cannabis store illegally) had not been cured, the landlord was entitled to act on the original notice sent six months earlier, because the notice made it clear that the landlord was not willing to continue the lease if the business operating out of the premises was illegal. Therefore, no fresh notice was required.

Under the *Cannabis Control Act*, the landlord also had an obligation to take reasonable steps to prevent further unauthorized sales of cannabis once it found out that its property was being used to sell cannabis illegally. The Court found that changing the locks without further notice was a reasonable step.

The subtenant also argued that if the termination was valid, then it should be granted relief from forfeiture. The Court refused to do so on the basis that the breach was grave, and the subtenant had not made diligent efforts to pursue an exemption or apply for a license in order to comply with the lease or the law.

The subtenant appealed the Court's decision. The Court of Appeal dismissed the appeal, and upheld the lower Court's decision that waiver could not be established because the subtenant misled the landlord into believing that an exemption existed and the breach had been cured. There was no intention by the landlord to abandon its rights, and once the landlord was informed that the breach was subsisting, it was entitled to terminate the lease based on the notice. The Court of Appeal also refused to grant the subtenant relief from forfeiture.

CID v Garnier Holdings, 2021 ONSC 196

The tenant leased premises from the landlord and later subleased the whole of the premises to a subtenant. The economic impacts during the onset of COVID-19 were felt by all parties. The tenant fell into arrears, and the landlord changed the locks to the premises. This meant the subtenant could no longer access the premises.

The subtenant argued that the sublease was terminated when the landlord changed the locks. The tenant argued that the landlord unlawfully terminated the lease by changing the locks, and as a result, the head lease remained in effect and the subtenant was still bound to its sublease. The landlord argued that the tenancy was validly terminated. The tenant further alleged an oral agreement existed with the landlord to pay a 50% rental rate for the months of April and May 2020, with the remainder being amortized over the coming year. The landlord claimed it had no knowledge of such agreement. Consequently, when the tenant refused to pay its full rent, the landlord opted for termination.

The subtenant brought an application for declaration that the sublease was terminated.

The Court found that the sublease was terminated when the landlord changed the locks. A review of the case law revealed several principles relevant to the issues at play: (i) the effect of changing the locks has been held to constitute termination of a lease, (ii) the termination of a head lease results in termination of a sublease, and (iii) where the landlord's intention is to exclude the tenant, the lease is terminated. The Court was satisfied that the landlord intended to exclude the tenant from the premises. Therefore, the head lease was terminated.

The tenant argued that, though termination occurred, it was unlawful pursuant to new COVID-19 related amendments to the *Commercial Tenancies Act*. The landlord changed the locks on May 25, 2020. The amendments state that landlords were prohibited from exercising the right of re-entry between May 1 and June 18, 2020. If landlords commenced re-entry, they are required to restore possession; however, tenants also had the option to decline possession. The Court interpreted this as being applicable to both leases and subleases equally. As discussed above, a termination of a head lease is a termination of a sublease, and therefore the subtenant had the option to walk away once the landlord commenced re-entry.

The Court further rejected the tenant's argument that it had an oral agreement with the landlord regarding a 50% rent rate. Since it was a lease for greater than ten years, it would not be excepted from the *Statute of Frauds*, which otherwise requires leases to be in writing. The agreement was therefore unenforceable. Consequently, the tenant went into arrears with the landlord, which gave rise to its right to re-enter the premises.

The tenant also argued that it is entitled to relief from forfeiture, an equitable remedy that would restore its possession of the premises. The Court refused to grant the tenant such relief. One requirement for the remedy is to come to court with "clean hands" – that is, not to be guilty of improper conduct when seeking equitable relief. The Court found the tenant did not have clean hands for a few reasons: it argued, with no evidence, of an oral agreement; it prepared a letter on the landlord's letterhead confirming the oral agreement and asked the landlord to confirm; and the

fact the alleged oral agreement was made with the eighty-five-year-old principal of the landlord (who was in questionable health at the time of the alleged agreement).

The subtenant was granted a declaration that the sublease was terminated by operation of law.

Drop and Run Inc. v. 1909703 Ontario Inc., [2021] OJ No. 4384, 2021 ONSC 5583, August 17, 2021, LK McSweeney J.

The subtenant was a shipping and delivery company which subleased premises in Mississauga for a period of two years from the sublandlord. In September of 2020, the sublandlord locked out the subtenant for nonpayment of rent.

The subtenant brought an application and sought relief from forfeiture. It argued that the lockout was unlawful as it had paid reduced rent of 25% pursuant to an oral agreement between the subtenant and the sublandlord. The sublandlord denied that there was any amendment, oral or otherwise, to the sublease terms.

In October 2020, after being locked out for 26 days, the subtenant was granted the interlocutory injunction to allow it to re-enter the premises and continue operating. In early 2021 the Court denied the sublandlord's motion for an urgent hearing to declare the subtenancy at an end. The lease then ended at the end of May, 2021.

Given the forgoing, the only remaining issue before the Court on the subtenant's application was whether the lockout was unlawful, and whether the subtenant should be successful in its claims for business losses for the 26-day lockout. The Court had to consider whether an amending agreement to reduce the rental payments was made, and whether the lockout was precluded by the 2020 moratoriums preventing CECRA eligible landlords from terminating tenants.

The tenant alleged that the agreement arose from a meeting between the parties' principals and was not confirmed in writing or by subsequent communication. The subtenant's evidence was that this meeting took place in March 2020. It started paying reduced rent in March of 2020.

The sublandlord denied that this meeting took place or that it had agreed to a rent reduction. It said that a discussion had taken place in April 2020 about pandemic losses, when the CECRA program was announced. Instead, at that time it provided documentation to the subtenant about the CECRA program and asked for the information so that it could apply. It never received this information requested from the subtenant. The subtenant denied receiving this request, but the Court found it had. The Court found that this sequence of events, and timeline, were more credible, as the CECRA program was only announced in April 2020, and there was no explanation for the subtenant's payment of 25% of rent in March. In fact, the sublandlord had requested full rent. The sublandlord could not complete a CECRA application, as it was not provided the information by the subtenant.

The Court found that an oral agreement to reduce rent made no commercial sense in this context, especially given that the sublandlord continued to pay the head landlord its own lease payments and could not reduce subtenant's rent without paying from its own pocket, and that its business was suffering at least as much, if not more, than the subtenant's. The Court also found that the sublandlord had continued to request full rent from the subtenant throughout the summer of 2020.

The Court then found that the subtenant's failure to provide the information the sublandlord would have needed to demonstrate business losses, which it needed to file for CECRA, precluded it (and the sublandlord) from falling within the scope of the statutory prohibition on evictions. In addition

the moratorium on evictions ended seven days before the lockout occurred; therefore, the lockout was lawful.

This decision of Justice McSweeney was affirmed by the Court of Appeal in May 2022.

Meridian CC Intl Inc. v. 2745206 Ontario Inc., 2021 ONSC 3270

The tenant leased premises in a building to operate a retail store. In 2020, the tenant's previous landlord renewed the lease for another five-year term. The building was later purchased by a new landlord. After purchasing the building, the landlord sent the tenant 180 days' notice to terminate pursuant to a remodelling and demolition clause in the lease.

The remodelling and demolition clause provided that if the landlord sought at any time to remodel or demolish the premises or any part thereof, to an extent that rendered continued possession by the tenant impracticable, the tenant was required, upon receiving 180 clear days' written notice from the landlord to: (a) surrender the lease; and (b) vacate the premises and give the landlord possession.

The tenant disputed the landlord's termination notice and commenced legal proceedings. It took the position that the landlord did not have a valid right to exercise any early termination of the lease, and, that by terminating the lease pursuant to the remodelling and demolition clause, the landlord had acted in bad faith.

The landlord then brought a motion for summary judgment. The tenant argued that the landlord was trying to get rid of its store because it did not agree to the landlord's proposed rent increase. The tenant argued that the landlord was improperly using the remodelling clause to deny the tenant's rights under the lease, and that the landlord was therefore not entitled to terminate the lease.

The Court disagreed with the tenant's argument that the landlord's decision to terminate was a result of the tenant's refusal to pay increased rent. The Court held that based on the evidence, it was clear that the landlord considered remodelling and demolishing part of the premises before it had even purchased the building. The Court found that when the tenant advised it wanted to stay, the landlord had then asked the tenant to pay triple the rent it was currently paying. When the tenant declined, the landlord had proceeded with its original plan to remodel and demolish a part of the premises. The Court also found that the landlord gave the tenant appropriate notice as according to the lease and that nothing more was required by law. On that basis, the Court concluded that the landlord was entitled to rely on the remodelling clause to terminate the lease.

The Court noted that the landlord's decision to exercise its termination right under the remodelling clause was not nefarious. The remodelling clause was a term that both parties agreed to. The clause provided the tenant with six months' notice to allow the tenant to pursue alternative options. The Court held that if the tenant had disagreed with the remodelling clause, it could have objected to it when the parties were negotiating the lease.

Therefore, the Court found that the lease was properly terminated in accordance with the terms of the lease.

The Court also found that the landlord did not breach its duty of good faith. The tenant had argued that the landlord acted in bad faith because after it refused to pay the increased rent, the landlord's

plans evolved from a simple sketch to more detailed renovations of the tenant's store unit. However, the Court stated that even though the plan had evolved, the initial sketch was enough to determine the issue. In particular, the Court held that the initial sketch alone showed that most of the premises would be remodeled or demolished – thereby entitling the landlord to rely on the remodelling clause to terminate the lease.

The tenant further argued that the proposed renovation was a peril which fell under the damage and destruction clause in the lease which provided for termination if the premises were damaged or destroyed, in whole or in part, by fire or other "peril", and, the damage was not repaired within 120 days. The tenant argued that the renovation was a peril so that the tenant should be entitled to continued possession of the premises with a rent abatement for the loss of the garage, half the main floor, and part of the basement that made up the premises. The Court disagreed. It held that if renovations were a peril, then the remodelling and demolition clause could never apply. By its ordinary interpretation, the provision dealt with fires and unintended perils, not renovations.

The Court held that since the landlord had given the tenant the required 180 days' notice under remodelling and demolition clause, that left only the issue of whether the demolition and remodelling would render continued possession by the tenant impracticable. The tenant argued that its continued possession was not impracticable because it could restructure business so that its business could stay in the remaining, renovated, one-half of the main floor and rent the second half to a new tenant. The tenant argued that since it could remodel its business to use the remaining portion of the premises, the tenant should be able to stay in the remaining half.

The Court held that the tenant's argument would be tantamount to a right of first refusal which did not exist in the lease. It held that because the proposed remodelling and demolition deprived the tenant of substantial parts of the premises, its continued possession of the premises as a whole was impracticable. Once the landlord invoked the remodelling and demolition clause, to the extent possession was impracticable, it had the right to terminate the lease.

The tenant also argued that the landlord was estopped from terminating the lease as it relied on an alleged promise made by the previous landlord that the tenant could stay for a five-year term. The Court found that although the previous landlord did agree to let the tenant stay for the five years, no promise or representation was made by the current landlord that it would not exercise early termination rights under the renewed lease. Without this, the tenant could not rely on promissory estoppel.

The Court therefore held that the landlord validly exercised its right to terminate the lease under the remodelling and demolition clause.

Spot Coffee Park Place Inc. v Concord Adex Investments Ltd., [2021] OJ No 5290 (Ontario Superior Court of Justice, March 1-5, 2021, S. Vella J.)

The landlord, a developer and builder of residential condominiums, leased to the tenant, a high-end café chain, a retail unit in one of its condominium buildings. The landlord and tenant entered into a 10-year fixed term lease.

The tenant took possession of the premises two years after the lease was executed but ceased to carry on its business and abandoned the premises a year later. The landlord terminated the lease, on notice, shortly after the tenant abandoned the premises.

The tenant alleged that the landlord made several negligent misrepresentations during precontractual negotiations, but for which they would not have entered into the lease. The tenant claimed that the landlord made representations to them regarding the occupancy levels of the building in which the café was to be situated, as well as the surrounding buildings and townhouses owned by the landlord. The tenant also claimed that further representations were made to them regarding free and easily accessible parking for its prospective clients. These two misrepresentations underpin the tenant's claim against the landlord.

The landlord brought a counterclaim against the tenant, denying that such representations were made and claiming that an "entire agreement" clause in the lease excluded the tenant from bringing forth any negligent misrepresentation claims against it. An "entire agreement" clause essentially nullifies any prior agreements or representations, made by either party that are not expressly included in the lease. The landlord claimed that the entire agreement clause excluded the occupancy levels and parking representations since they were not expressly included in the lease.

There were no meeting minutes or any other form of written proof of the misrepresentations alleged by the tenant. The Court relied on both parties' witnesses.

The Court accepted that both the occupancy levels and parking accessibility representations were made. In establishing that these representations were made, the Court emphasized the parties' sophistication and their preexisting landlord-tenant relationship, formed by an earlier lease agreement.

The Court accepted that the occupancy level representation, although untrue, was not made negligently by the landlord. The Court found the parking accessibility and availability representation made by the landlord to be both untrue and that the landlord was negligent in making it. The Court held that the tenant relied on the negligent misrepresentations made by the landlord to enter into the lease, and that its reliance was reasonable and to its detriment.

The Court determined that the parking misrepresentation made by the landlord was not excluded by the "entire agreement" clause. In determining that the misrepresentation did not fall under the ambit of the exclusionary clause, the Court looked to the nature of the representation and industry practices.

The Court awarded the tenant damages to remediate the operation costs incurred by the tenant until the premises was abandoned, as well as costs expended to construct, design, and fixture the premises. In awarding these damages, the Court emphasized the tenant's reliance on the landlord's negligent misrepresentation to enter into the lease.

The Court dismissed the landlord's counterclaim for damages against the tenant. However, the Court asserted that if no actionable misrepresentation was established, the tenant would have been in breach of the lease and the landlord awarded damages for rent in arrears, loss of future rent under the balance of the fixed term lease subject to mitigation, and damages for expenses incurred in securing a new tenant.

24827261 Ontario Corporation o/a Symphony Banquet Hall v. 2612123 Ontario Inc., 2021 ONSC 336

The tenant leased property from the landlord to operate a banquet hall. The onset of the COVID-19 pandemic significantly impacted the tenant's ability to pay rent.

Rent under the lease amounted to $11,865.00 per month. The onset of the pandemic prevented the tenant from operating its business. Consequently, the tenant missed its payment of March 2020 rent. Communications with the landlord then left the tenant under the impression that it could pay March rent after it re-opened for business. The tenant then argued that subsequent communications with the landlord resulted in an agreement to abate rent to 25% of the amount payable (in which the landlord could recover the remainder under the CECRA Program) for the months of April to September. The landlord disputed this. It argued that there was neither an agreement to abate rent nor permit the tenant to pay March rent only after re-opening.

In October 2020, the landlord locked the tenant out of its premises. The tenant applied to the Court for the remedy of relief from forfeiture.

The Court found that the tenant was correct in assuming that agreements had been reached between the landlord and the tenant with respect to rents between March and September 2020.

The landlord focused its arguments on two key points. First, although it had the tenant fill out a CECRA application form, the landlord never actually applied for the program. Therefore, having only received 25% rent for the period of April to August 2020 (as the tenant paid its full rent in September), the tenant was still "factually" in arrears. Second, the lease stated no "term or condition . . . shall be deemed to have been waived by the Landlord unless . . . [it] is in writing and signed", and since there was only informal discussions, the landlord's right to claim full rent was never waived.

After reviewing the facts and email communications between the parties, the Court found there was an agreement to abate rent. There were various emails by the landlord indicated that extensions to the CECRA Program during 2020 had "been approved" and asking the tenant to "send the cheque for 25%" of rent.

The Court also noted the inconsistent position of the landlord in various notices sent to the tenant. One notice indicated that full March rent was outstanding in July, which supported the tenant's assertion that a rent abatement was agreed for the remaining months up to that point. A later notice demanded only March and October rents were outstanding in full, but just four days later, the landlord claimed the full amounts for March to October before locking the tenant out.

The Court found that these communications constituted a written and signed waiver.

The Court then found the tenant was entitled to relief from forfeiture. Tenants are entitled to such relief if the Court thinks fit after considering: (i) the gravity of the breaches, (ii) whether the object of the forfeiture was to secure payment, (iii) the disproportion between the value of the property and damage caused by the breach, (iv) whether the tenant came to court with "clean hands", (v)

whether the tenant outright refused to pay rent, (vi) how long the tenant was in arrears, and (vii) whether the landlord suffered a serious loss by reason of the delayed payment of rent.

In granting relief from forfeiture, the Court held that the tenant was reasonable in assuming the landlord was not expecting full rent payments, and that the landlord was unreasonable in lulling the tenant into thinking there was reduced rent. The inconsistent notices sent to the tenant showed bad faith by the landlord by not making its intentions clear. The tenant showed good faith by making payments during the onset of the pandemic. The Court also notes that the lease was set to expire in the months following the proceedings, and the landlord argued that the tenant would not be permitted to exercise its option to renew. However, the Court noted that the tenant still wished to exercise its option, and a finding of relief was the best option for potential reconciliation between the parties. Further, the Court notes that there would be minimal damage to the landlord.

The Court approved the tenant’s application for relief from forfeiture.

Kypriaki Taverna Ltd. v 610428 B.C. Ltd., 2021 BCSC 1711

Facts:

Kypriaki Taverna Ltd., the plaintiff landlord (the "**Landlord**") and 610428 B.C. Ltd., the defendant tenant (the "**Tenant**") entered a five-year lease for a restaurant premises, where the Tenant operated a restaurant. The five-year lease was renewed for a further five years on August 25, 2005. The renewed term expired on August 24, 2010, and for the following five years the parties tried to negotiate an extension of the renewal but were unable to come to an agreement. The tenancy was terminated on March 24, 2015 when the Tenant vacated the premises. The parties agree the tenancy continued on a month-to-month basis during the period from the expiry of the renewal term and the Tenant vacating the premises. Clause 14 of the lease obligated the Tenant to pay an amount equal to 125% rent of the rent payable for the final month (the "**Overholding Rent**"). However, a dispute exists between the parties regarding whether the Overholding Rent was payable during the period from August 24, 2010 to March 24, 2015 (the "**Month-to-Month Tenancy**"). It was noted the Tenant did not pay the Overholding Rent, but instead continued to pay the same rent throughout the Month-to-Month Tenancy that was paid during the last month of the renewal term. Accordingly, the Landlord made an application for a summary trial and claimed against the Tenant for damages for unpaid rent under the lease in the amount of $78,095.09, being the difference between the Overholding Rent and the actual rent paid by the Tenant. In addition, the Landlord further claimed $3,428.37 against the Tenant for cleaning and repairs after it vacated the premises.

Issues:

1. *Did the Landlord waive its entitlement under the lease for Overholding Rent during the Month-to-Month Tenancy?*

2. *Did the Tenant leave the Premises in a condition of disrepair such that the Landlord should be reimbursed for costs of cleaning and remediation?*

Held:

1. *Did the Landlord waive its entitlement under the lease for Overholding Rent during the Month-to-Month Tenancy?*

The Tenant claimed that the Landlord either expressly or implicitly through its conduct waived its rights under clause 14 of the lease to claim Overholding Rent and having waived those rights cannot now claim that the rent owed is in excess of what was paid by the Tenant. The Landlord on the other hand claims it never waived its rights, neither explicitly or implicitly, under clause 14, and it relied on clause 20.8, an entire agreement clause, to argue the lease can only be modified by writing. The Landlord further claimed the Tenant's conduct disentitled it from relief, because the Landlord believed the Tenant took advantage of the circumstances and engaged in "farcical negotiations" with no intention of renewing the lease.

According to the Court, waiver occurs when one party to a contract takes steps which amount to foregoing reliance on a known right or defect in the performance of the other party. Waivers can be expressed either informally or formally in writing. Regardless of how the waiver is expressed though, the party seeking to establish the existence of waiver must demonstrate that the waiving party had:

a) full knowledge of the rights being waived; and

b) a conscious and unequivocal intention to abandon those rights.

Further clarifying the law on waivers, the Court stated the overriding consideration in each case is whether one party communicated a clear intention to waive a right to the other party. As such, in this case the Tenant was required to demonstrate the Landlord had knowledge of its rights under clause 14 and that it consciously through words or conduct intended to abandon those rights for the duration of the Month-to-Month Tenancy.

The Court was satisfied the Landlord had the necessary knowledge of its right to the Overholding Rent under clause 14. This knowledge was admitted by the director of the Landlord during examination for discovery. Further, the Court also noted the director referenced the Landlord's rights under clause 14 in an email to the Tenant, dated May 9, 2012.

The Landlord did not expressly waive its rights, so the Tenant's claim is based on the conduct of the Landlord. On September 1 and September 2, 2010, the Landlord and Tenant engaged in discussions with respect to extending the lease. On September 2, 2010, the Landlord emailed the Tenant to formally propose terms of a new lease between the parties, including a term of five years and square footage pricing for rent, with increases proposed following the second and fourth year respectively. No mention was made at this time by either party of the Overholding Rent under clause 14, and the Landlord did not communicate it would be relying upon it. No agreement was reached by the parties at this time.

The Court noted that further attempts to negotiate an agreement occurred in late 2011 and early 2012. Both parties had legal representation at this time, and it was noted that still no mention had been made of the Overholding Rent under clause 14 of the lease. On May 9, 2012, the Landlord emailed the Tenant with a draft renewal of the lease, and in this email the Landlord explicitly referenced the Overholding Rent under clause 14 for the first time. The Court found this was the first and only reference to Overholding Rent under clause 14 during the Month-to-Month Tenancy. To that end, the Landlord made the following conditional offer of waiver:

> "Normally and according to our original lease there would be a 125% monthly rend due since August 2010 until now. Although the renewal was to start from August 2010 with the new rates, I am not looking for any lost revenue as far as the base rent goes until this coming August when the new rate comes into effect."

The Court noted during the period from August 2010 to May 9, 2012, when the Landlord emailed the Tenant with the draft renewal, the Tenant continued to pay rent in amounts equivalent to the

rent payable at the end of the renewal term, and that the Landlord accepted those rent payments without protest.

The Court found the conduct of the Landlord up to and including the time the draft renewal was emailed to the Tenant, on May 9, 2012, is consistent with an unequivocal intention to abandon the Landlord's rights to Overholding Rent. The Landlord was clearly aware of this right and yet made no reference to it for nearly two years following the expiration of the lease, and likewise the Landlord continued to accept the Tenant's minimal and additional rent payment during that time without any dispute or reference to clause 14. In these circumstances, it was reasonable for the Tenant to infer the Landlord was not seeking to enforce its rights and that the May 9, 2012, email was an indication that the Landlord intended to make up lost revenue through a rent increase once a new lease was renewed by the parties.

The Court found the May 9, 2012, email was not in and of itself enough to form the basis of a waiver of the Landlord's clause 14 rights. However, considered in the context of the conduct of the Landlord, the email bolstered the Tenant's claim of waiver. Given the Landlord's conduct prior to the email, the Court found it was incumbent on the Landlord to provide clear notice to the Tenant that it was retracting the waiver and would be relying on clause 14. In this regard, the Court noted a waiver can be retracted if reasonable notice is provided. According to the Court, in this case, given the circumstances and the conduct of the Landlord, the Landlord should have notified the Tenant that time was of the essence and that the waiver would not remain in effect past August if a new lease was not agreed to by then.

Following the May 9, 2012, email, the Court noted despite further negotiations regarding a lease renewal, neither party referenced the Overholding Rent. In addition, the Court found throughout the Month-to-Month Tenancy there was evidence that the Tenant would be unable to absorb significant rental increases, and for that purpose it had relied on the Landlord's waiver. Conversely, the Court found evidence in the Landlord's communications with its counsel, specifically calculations of Overholding Rent, that the Landlord was well aware of its rights under clause 14. However, according to the Court, the fact the Landlord chose not to rely on its calculations for overholding rent in its negotiations was evidence of a conscious choice by the Landlord not to rely upon its rights under clause 14.

By December 2012, it should have been clear to the parties that they were very unlikely to come to a negotiated agreement with respect to the lease extension. However, for more than two years following, the Landlord continued to accept, without protest or dispute, the monthly rent that was the base rent for the last year of the lease renewal in 2010 (i.e. $3,900 plus tax and additional rent). Yearly reconciliations provided by the Landlord during the Month-to-Month Tenancy reinforced that the minimal rent being paid was correct and did not indicate that additional amounts would be sought pursuant to the clause 14. Taken together, the conduct of the Landlord was found by the Court to be an unequivocal waiver of the Landlord's rights to rely upon the clause 14 during the Month-to-Month Tenancy.

With respect to the Landlord's reliance on clause 20.8, claiming this clause provided the lease can only be modified in writing, the Court was not persuaded this precluded the Landlord from waiving its rights through its conduct. The Court found this clause was likely designed to prevent a party

from alleging the existence of unwritten terms to the lease when it was made. But in the Court's opinion, such a clause does not bare a claim by a party that another party has waived its rights by conduct after the agreement was concluded. After reviewing clause 20.8, the Court found the language of this clause does not address the argument by the Tenant that the Landlord waived its rights. Further, clause 20.8 does not say provisions of the lease cannot be waived.

Finally, regarding submissions from the Landlord that the Tenant did not come before the Court with "clean hands" and should not be able to rely on an equitable defence, the Court did not accept that the Tenant's conduct was an elaborate plot to remain as a tenant in the premises at the same rent by stringing the Landlord along while having no intention to execute an extension to the lease, as was alleged by the Landlord. The Court found the evidence showed that both parties made efforts to try to come to an agreement, that both parties engaged lawyers to attempt to negotiate an agreement, and that both parties should have realized that a negotiated agreement was unlikely after December 2012. Yet despite these circumstances, both parties were content for the situation to continue as the *status quo* when negotiations broke down as evidenced by their conduct.

2. *Did the Tenant leave the Premises in a condition of disrepair such that the Landlord should be reimbursed for costs of cleaning and remediation?*

The Landlord claimed damages for cleaning and repairs to the premises after the Tenant vacated the premises. The Court noted clause 6.1.1 and 6.1.4 of the lease required the Tenant to maintain, repair, and keep the premises in good, order and repair, and that at the end of the term the Tenant would deliver vacant possession to the Landlord in the condition the Tenant was required to maintain the premises in. The Landlord submitted evidence in support of its claims of photographs taken on March 25, 2015, the day after the Tenant vacated the premises. Conversely, the Tenant submitted video evidence in its defence of damage purportedly caused by a leaking roof, and of cleaning efforts by the Tenant prior to vacating.

The Court found the premises were not left in the condition which it was required to be left in by the Tenant under clause 6.1.1 and 6.1.4 of the lease. The Court found the premises were clearly left in a state of disrepair. The Court was satisfied that the expenses incurred by the Landlord for cleaning totaling $2,430.00 were reasonable in the circumstances. According to the Court, this amount was to be set-off against the $5,446.68 damage deposit that was paid by the Tenant, with the remaining $3,016.68 being credited to the Tenant. However, while the Tenant would normally be entitled to that credit, in this case the Tenant chose not to pay the last month's rent on the premises on the basis it would be covered by the Landlord's retention of the damage deposit. Noting the final month's rent as $5,730.47 and deducting the remaining $2,016.68 from the damage deposit, the Court found the Tenant liable to the Landlord for a remaining $2,713.79 for the final month's rent.