CITATION: Bellwoods Brewery Inc. v. 1896841 Ontario Limited, 2023 ONSC 2845
COURT FILE NO.: CV-17-568431-0000 & CV-18-00599693-0000
DATE: 20230511

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Bellwoods Brewery Inc. Plaintiff (Defendant to the counterclaim)	James Renihan and Lauren Rennie, for the plaintiff (defendant to the counterclaim)
– and –	
1896841 Ontario Limited Defendant (Plaintiff by counterclaim)	Jonathan Rosenstein, for the defendant (plaintiff by counterclaim)
AND BETWEEN:	
Lennard Commercial Realty Plaintiff	James Renihan and Lauren Rennie, for the plaintiff
– and –	
1080414 Ontario Ltd., 1896841 Ontario Limited, and Pat Johnson Defendants	Jonathan Rosenstein, for the defendants
	HEARD: February 21, 22, 23, 24, 27, and March 2, 2023

ROBERT CENTA J.

[1] Mike Clark and Luke Pestl founded the plaintiff, Bellwoods Brewery Inc., to brew craft beer. Since 2012, Bellwoods has operated a brewery, retail store, restaurant, and bar from a location on Ossington Avenue in Toronto. By all accounts, Bellwoods has enjoyed critical acclaim and strong customer support. Mr. Clark testified that Bellwoods could not brew

enough beer to meet demand and that patrons frequently lined up to wait for a seat at the Ossington restaurant. Given its early success, Bellwoods looked to expand to a second location. In November 2013, Bellwoods appointed Lennard Commercial Realty to assist Bellwoods to lease or purchase new brewery and related facilities.

[2] At about the same time, Pat Johnson, the principal of the defendant, 1896841 Ontario Limited, retained a real estate agent to lease a portion of the building it owned at 950 Dupont Street, which is located at the corner of Dovercourt Road in Toronto. 950 Dupont is an extraordinary building, which used to house a manufacturing plant. The western portion of 950 Dupont is comprised of an 11,000 square foot glass box with 40-foot ceilings. The glass box shares an interior wall with a brick portion of the property immediately to the east of the glass box.

[3] In January 2014, Lennard told Bellwoods about the leasing opportunity at 950 Dupont. Bellwoods was extremely interested in the property. The parties engaged in protracted negotiations throughout 2014 and into 2015. During the negotiations, 1896841 Ontario Limited was represented by an experienced commercial real estate brokerage and a real estate lawyer. Bellwoods was represented by Lennard and its own lawyer.

[4] On May 21, 2015, 1896841 Ontario Limited (the "Landlord") and Bellwoods signed a 20-year lease agreement. Pursuant to the lease, Bellwoods would rent the glass box and part of the brick building. The lease permitted Bellwoods to use the leased premises as a brewery, a restaurant and bar, public event space, retail beer store, and ancillary office space.

[5] Unfortunately, Bellwoods never occupied the leased premises. Bellwoods commenced this action alleging that the Landlord breached the lease and seeking an order of specific performance. The Landlord counterclaimed for unpaid rent. Lennard sued the Landlord and others for its unpaid commission. All of these actions proceeded to trial before me.

[6] For the reasons set out below, I find that the Landlord breached the lease when it failed to vacate the leased premises. Bellwoods gave the Landlord many opportunities to live up to the obligations under the lease. The Landlord completely disregarded these obligations. Bellwoods did not breach the lease and the Landlord's counterclaim is dismissed.

[7] I find that ordering specific performance of the lease rather than its monetary equivalent betters serves justice between the parties. Bellwoods is also entitled to damages to reflect the delay in its operations at 950 Dupont that would have commenced on August 1, 2016, but for the Landlord's breach of the lease.

[8] Finally, I dismiss Lennard's action because its contract did not entitle it to a commission unless and until Bellwoods occupied the leased premises.

Issue one: The lease required the Landlord to stop using and to leave the leased premises

[9] This action turns on the meaning of s. 6.1 of the lease.

[10] Bellwoods submits s. 6.1 required the Landlord to vacate the leased premises within 30 days. To Bellwoods, the language of the contract is clear: vacate means vacate; and leave leased premises free of all inventory and debris means exactly that.

[11] The Landlord submits that s. 6.1 only required the Landlord to "empty the leased premises of personal property to the extent reasonably necessary to permit Bellwoods to engage in the design process." The Landlord submits that Bellwoods interpretation of s. 6.1 is wrong, overbroad, and makes no business sense.

[12] For the reasons that follow, I agree with Bellwoods' interpretation of s. 6.1.

Principles of contract interpretation

[13] The lease was a contract negotiated between the parties. Neither party established that the lease was a standard form contract, and they agree that the usual rules of contract interpretation apply to the lease. The Court of Appeal for Ontario has held that when interpreting a contract, a judge should:

a. determine the intention of the parties in accordance with the language they have used in the written document, based upon the "cardinal presumption" that they intended what they said;

b. read the text of the written agreement as a whole, giving the words used their ordinary and grammatical meaning, in a manner that gives meaning to all of the agreement's terms and avoids an interpretation that would render one or more of its terms ineffective;

c. read the contract in the context of the surrounding circumstances known to the parties at the time of its formation. The surrounding circumstances, or factual matrix, include facts that were known or reasonably capable of being known by the parties when they entered into the written agreement, such as facts concerning the genesis of the agreement, its purpose, and the commercial context in which it was made. However, the factual matrix cannot include evidence about the subjective intention of the parties; and

d. read the text in a fashion that accords with sound commercial principles and good business sense, avoiding a commercially absurd result, objectively assessed.[1]

[1] *Weyerhaeuser Company Limited v. Ontario (Attorney General)*, 2017 ONCA 1007, 13 C.E.L.R. (4th) 28, at para. 65, rev'd on other grounds, *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60, [2019] 4 S.C.R. 394; *Thunder Bay (City) v. Canadian National Railway Company*, 2018 ONCA 517, 424 D.L.R. (4th) 588, at paras. 30, 46; *Ottawa (City) v. ClubLink Corporation ULC*, 2021 ONCA 847, 159 O.R. (3d) 255 at para. 52; *Dumbrell v. Regional Group of Companies Inc*., 2007 ONCA 59, 85 O.R. (3d) 616, at para. 53.

[14] As Laskin J.A. noted in *City of Thunder Bay*, the "overriding principle is that the meaning of an agreement and the intent of the parties in entering into it must be derived from the words the parties used and the context in which they used those words." For this reason, context (sometimes described as "the surrounding circumstances" or "the factual matrix") almost always matters because words rarely have meaning apart from their context.[2]

The circumstances surrounding the contract

[15] The parties agreed that Bellwoods would rent only a portion of 950 Dupont. The leased premises would include the glass box, and a portion of the brick building. At the time the parties signed the lease, Mr. Johnson's furniture business and an appliance store called "Appliance Love" occupied a portion of the premises to be leased by Bellwoods. Mr. Johnson used the glass box to store inventory and his furniture showroom occupied part of the leased premises. The parties understood that Mr. Johnson might continue to operate the furniture business in other portions of the property that Bellwoods had not leased.

[16] On May 21, 2015, the parties signed a lease agreement that was dated January 20, 2015. The lease had a 20-year term with two five-year extensions available. Bellwoods paid $113,000 as a deposit to the Landlord.

[17] The parties understood that the building required extensive renovations before Bellwoods could use the space. Given the timelines in the lease, and the extent of the required renovations, Bellwoods expected to begin public operations in August 2016.

Section 6.1 of the lease

[18] Section 6.1 of the lease contains three paragraphs. The second paragraph is the most important, but it should be considered in light of the first and third paragraph, and the balance of the lease.

[19] The first paragraph of s. 6.1 confirmed that the Landlord had approved Bellwoods' preliminary design plans for the leased premises, which were attached to the lease as Schedule D. Bellwoods agreed that it would provide any revisions of the plans to the Landlord for review and approval in accordance with s. 6.1.

[20] The third paragraph of s. 6.1 provided that the parties would eventually apply for a single building permit for the work necessary to renovate the premises. I will now turn to the second paragraph, which is the key portion of s. 6.1.

[21] The second paragraph of s. 6.1 contains three obligations. First, the Landlord is required to vacate the premises. Second, Bellwoods is then to prepare and provide to the Landlord a full set of draft architectural, mechanical, and design drawings. Third, the Landlord is to

---

[2] *City of Thunder Bay*, at para. 30.

revise and approve the full set of drawings. The first sentence of the second paragraph of s. 6.1 of the lease lies at the heart of this action. The second paragraph reads as follows:

> The Landlord covenants to vacate the Leased Premises within thirty (30) days of the Lease Execution Date and to leave the Leased Premises free of all inventory and debris. On or before the date which is sixty (60) days following the date the Landlord vacates the Leased Premises, the Tenant shall prepare and deliver to the Landlord a full set of draft architectural, mechanical and electrical design drawings and specifications in respect of the construction of the Landlord's Work and the Tenant's Work (together the "Draft Plans and Specifications"), prepared in accordance with the Tenant's Preliminary Plans, for the Landlord's review and approval. The cost of the preparation of the Draft Plans and Specifications will be borne solely by the Tenant. The Landlord shall provide the Tenant with its written approval of the Draft Plans and Specifications, or its request for revisions in respect thereof, within ten (10) days of the Landlord's receipt thereof. If revisions are requested by the Landlord to the Draft Plans and Specifications, then the parties covenant to cooperate between themselves and take such steps as may be reasonably required in order to ensure that the Draft Plans and Specifications are approved by the Landlord within twenty (20) days of the Landlord's initial request for revisions as aforesaid. The Landlord shall be responsible for retaining and compensating its own consultants to review and approve the Draft Plans and Specifications. [emphasis added]

[22] Reading the lease as a whole, and in light of the surrounding circumstances, I find that the parties agreed in s. 6.1 that the Landlord would leave the leased premises within 30 days of May 21, 2015. The Landlord further agreed that when it left the leased premises, it would leave them free of all inventory and debris.

[23] I see nothing in the rest of the lease, the surrounding circumstances, or sensible commercial practice that suggests giving “vacate” a meaning other than its ordinary, grammatical meaning. To vacate means to leave a place that one previously occupied. This meaning makes sense in light of the circumstances known to the parties at the time they signed the lease. The Landlord was using the glass box for storage and inventory, part of the leased premises for the operation of a furniture store, and Appliance Love occupied another part of the leased premises. Including a provision that required the Landlord to leave the spaces it previously occupied within a fixed time frame makes sense in the structure of the lease, which had a number of steps that would follow once the Landlord had vacated. In addition, requiring the Landlord to leave the vacated premises free of “inventory and debris” directly responds both to the Landlord’s use of the leased premises as places that it stored furniture inventory and materials, and Appliance Love’s use of the leased premises to store and showcase its inventory.

[24] Contrary to the submissions of the Landlord, I do not think this interpretation of the clause is commercially unreasonable. The parties signed a long-term lease and agreed to embark on an extensive program of renovations. To prepare the plans, Bellwoods had to retain mechanical and electrical engineers (Spline Group) and structural engineers (Blackwell) to analyze the leased premises and prepare detailed documents outlining how Bellwoods could use the leased premises safely and efficiently. It makes commercial sense that, as a first step, the Landlord would leave the premises it had previously occupied but had now leased to Bellwoods and would leave those spaces free of inventory and debris.

[25] The Landlord submits that I should interpret the first sentence of s. 6.1 in light of its purpose and conclude that it only required the Landlord to empty the leased premises of personal property to the extent reasonably necessary to permit Bellwoods to engage in the design process. I disagree. Even if that was the Landlord's subjective intention at the time it signed the lease, that evidence is not relevant. I am not to interpret the agreement based on the parties' subjective intentions at the time they drafted the contract, but rather with the intent they expressed in the written words of the contract.[3]

[26] I accept that one of the purposes of s. 6.1 was to permit Bellwoods to undertake the design process. I do not think, however, that this was the clause's only purpose given the surrounding circumstances described above. More importantly, the parties chose language that was more expansive than that narrow purpose articulated by the Landlord.

[27] I see nothing in the text of s. 6.1 that permits the Landlord to comply with that provision by temporarily vacating the leased premises. There is nothing in the lease that supports such a limitation on the meaning of vacate. Moreover, there is nothing in the lease that provides the Landlord with the right to re-occupy the space after it has vacated it.[4] The Landlord was under an obligation to vacate and to leave the space clear of inventory and debris. I see nothing that permits the Landlord to bring inventory or debris back into the leased premises. Indeed, doing so would violate the express language of the lease. The Landlord's proposed interpretation would do violence to the clear language and intent of that clause and would effectively rewrite the parties' agreement.[5]

[28] For this reason, nothing turns on the factual dispute over whether or not the glass box was emptied from time to time before December 2015. I prefer the evidence of Mr. Clark that this was not the case, but it does not matter. The Landlord was not permitted to refill the glass box with inventory and debris even if it had been emptied temporarily.

[29] I accept the Landlord's submission that it may not have been required to remove the fixtures from the area of the leased premises that Appliance Love occupied within 30 days of May 21, 2015. However, the Landlord and its month-to-month tenant Appliance Love

---

[3] *Dumbrell*, at para. 50.
[4] *1465152 Ontario Limited v. Amexon Development Inc*., 2015 ONCA 86, at para. 15.
[5] *Niagara Falls Shopping Centre Inc. v. LAF Canada Company*, 2023 ONCA 159, at para. 37.

were still required to vacate the leased premises and remove all inventory and debris in that period of time.

[30] I also accept the Landlord's submission that Bellwoods did not have the right under the lease to possess the leased premises during the initial design phase. Sections 2.3, 3.3, and 6.2 provide rights of possession to Bellwoods much later in the renovation process. I do not think this affects the Landlord's obligation to vacate within 30 days. There is no commercial absurdity in a lease that permits neither the Landlord nor Bellwoods to occupy the leased premises during the design and build process.

[31] The Landlord went further and submitted that Bellwoods did not even have the right to access the leased premises during the design process. On its theory, the lease did not permit Bellwoods to enter on its own, or with its consultants, to "prepare and deliver to the Landlord a full set of draft architectural, mechanical and electrical design drawings and specifications in respect of the construction of the Landlord's Work and the Tenant's Work." Even if Bellwoods wanted to "tape and chalk" the leased premises before committing to a multi-million dollar renovation, the Landlord submits that the lease did not permit such activity.

[32] I do not accept the Landlord's interpretation of the lease. First, the Landlord never took this position until after Bellwoods commenced this action. Second, this interpretation of the lease is inconsistent both with the narrow purpose of the provision advanced by the Landlord as well as the broader purpose that I have accepted. Third, the conduct of both parties was entirely inconsistent with this interpretation of the lease.

[33] In conclusion, reading the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract, I find that the Landlord agreed to leave the leased premises within 30 days of May 21, 2015. The Landlord further agreed that when it left the leased premises, it would leave them free of all inventory and debris. This interpretation, in my view, is grounded in the text of the lease and reflects the mutual and objective intention that the parties expressed in the lease.[6]

Issue two: the Landlord breached the lease because it did not vacate the leased premises

[34] Bellwoods submits that the Landlord failed to comply with s. 6.1 in many ways including by continuing to operate its furniture business out of the leased premises, permitting Appliance Love to continue to operate out of the leased premises, not emptying the glass box of inventory and debris, and operating third party events out of the Leased Premises. Bellwoods submits that not only did the Landlord not vacate in 30 days, it never vacated the leased premises at all.

---

[6] *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, [2014] 2 SCR 633, at paras. 47 and 57; *Niagara Falls Shopping Centre Inc*., at para. 32.

[35] The Landlord concedes that it took longer than 30 days to clean out the glass box,[7] that it never cleared out the portion of the leased premises it used as a furniture showroom, and that Appliance Love continued to occupy the leased premises until well after November 2016. Moreover, Mr. Johnson gave evidence that he knew that Bellwoods wanted the space to be empty and for him not to use the space at all. He explained that he did not vacate the leased premises because he "didn't want to."

[36] Given my interpretation of s. 6.1, the Landlord has effectively conceded that it breached the provision. However, I think it is necessary to canvass the Landlord's complete disregard for its obligations under the lease. In my view, this conduct is relevant to issues of causation, damages, and Bellwoods' request for specific performance.

June 2015 to November 17, 2015 – the Landlord ignores Bellwoods' demands for compliance

[37] The Landlord covenanted to vacate the leased premises and to leave them free of all inventory and debris by June 20, 2015. As of that date, however, the Landlord continued to occupy one portion of the leased premises to operate its furniture showroom, continued to store inventory and debris in the glass box, continued to use the loading docks, and continued to allow Appliance Love to occupy a portion of the leased premises.

[38] On September 29, 2015, the Landlord had still not vacated the leased premises. On that day, Bellwoods sent an email to the Landlord that stated, in part, that Bellwoods could "begin producing the 'Tenant's Plans and Specifications' as long as we can get the following completed." The email then identified four items that Bellwoods needed the Landlord to do. I accept Mr. Clark's evidence that he discussed with Mr. Johnson that Bellwoods needed the Landlord to complete these items in a couple of weeks. The Landlord did not complete the tasks in a few weeks. Bellwoods was not satisfied with the steps taken by the Landlord and retained litigation counsel.

[39] On November 17, 2015, Bellwoods delivered a demand letter to the Landlord. Bellwoods took the position that the Landlord had breached the lease because it had neither vacated the leased premises nor left them free of inventory. Bellwoods demanded that the Landlord vacate immediately and confirmed that it was not waiving any of its rights under the lease. Bellwoods noted that the Landlord's breach of the lease was delaying Bellwoods' preparation of the drawings, the renovations, and its opening date because none of those steps could happen until the Landlord vacated the leased premises. Bellwoods noted that the Landlord was causing damage to Bellwoods:

> Bellwoods is eager to commence the above listed steps and begin conducting business at the Leased Premises. Operating out of the Leased Premises is integral to an expansion of Bellwoods' business and is of tremendous importance. Delays in commencing operations at the Leased Premises delays Bellwoods' ability to begin profiting

[7] As noted above, I find that the glass box was not emptied before December 2015 and, in any event, the Landlord filled it with inventory, debris, and other items thereafter.

> from the new operation, threatens to impact its consumer goodwill and makes it vulnerable to competitors who may establish operations in the vicinity, generating goodwill among customers before Bellwoods has an opportunity to do so.

[40] Remarkably, neither the Landlord nor its lawyer ever responded to this letter.

February to April 2016 – the Landlord rents out the leased premises for raves and skateboard events

[41] In February 2016, the Landlord permitted a third party to use the space leased by Bellwoods to host a Valentine's Day party. The third party offered tickets for sale to the public and advertised the event, which was promoted by BlogTo through the URL "epic party coming to warehouse on Dupont." The Landlord did not seek Bellwoods' permission to use the space it had leased for this purpose. Bellwoods objected to this use of the leased premises, which it felt could jeopardize its relationship with the neighbourhood and its ability to get a liquor licence. Although Mr. Johnson told Bellwoods that he would cancel the event, he did not do so. Bellwoods was stunned not only that the Landlord put an "epic party" in the space but that the Landlord lied to them about cancelling the event. I accept that this incident caused Bellwoods to become less willing to compromise its position.

[42] The Landlord also rented the leased premises to the clothing company Vans for the period of March 16 to April 2, 2016. Vans used the glass box for a skateboard park, to host musical performances, and to serve alcohol.

[43] On February 26, 2016, counsel for Bellwoods wrote to counsel for the Landlord. Bellwoods reiterated that it did not condone the Landlord's breaches of the lease (including its failure to vacate) and reserved its rights to seek damages. Bellwoods again requested documents relating to Appliance Love's continued occupancy of part of the leased premises. Bellwoods also objected to the Landlord's decision to rent portions of the leased premises to third parties and expressed concern that the use of the building for such events could impede Bellwoods' ability to obtain liquor licences and regulatory approval for its permitted and intended use of the space. Bellwoods demanded a meeting among the parties and counsel to resolve this impasse. The Landlord finally agreed to such a meeting in June 2016.

[44] In early March, Bellwoods asked the Landlord when the Vans skateboard park would be removed so that Bellwoods could chalk the floor to design the layout of the restaurant. Bellwoods specifically asked for the Landlord to ensure that the certain key areas of the glass box were empty. On April 6, 2016, the Landlord advised that the space was now vacant. It was not. There were still temporary walls and structures in the places Bellwoods asked the Landlord to empty. I accept that the Landlord's failure to vacate the space, even when it said that it had vacated the space, further eroded Bellwoods' willingness to compromise.

June 2016 to January 2017 – the Landlord breaches its subsequent agreement with Bellwoods and refuses to vacate

[45] On June 3, 2016, Bellwoods, the Landlord, and their lawyers met to discuss the status of the lease. Later that day, counsel for Bellwoods wrote to counsel for the Landlord to summarize the discussion. Bellwoods reiterated its position that the Landlord had still not vacated the leased premises and needed to do so. Bellwoods requested that the Landlord do three things to vacate the premises:

a. terminate the lease with Appliance Love and keep that space vacant;

b. clear the leased premises of all inventory, debris, equipment, and other material; and

c. stop using the loading docks, which were located within the Leased Premises.

[46] Bellwoods proposed to give the Landlord until November 1, 2016, to vacate the space in exchange for the Landlord agreeing that if it failed to meet that deadline, that would amount to a repudiation of the lease. Bellwoods took the position that such a repudiation would give Bellwoods the right, but not the obligation, to treat the Lease as at an end. Bellwoods did not waive any of its other rights. Bellwoods asked the Landlord to confirm in writing that it would vacate by November 1, 2016, and that the Landlord agreed that failure to do so would constitute a repudiation of the Lease.

[47] On June 24, 2016, counsel for the Landlord advised that the Landlord agreed to all of the terms proposed by Bellwoods, except that the Landlord wanted an extension to the date for vacating the premises. The Landlord indicated that it needed another two weeks, until November 15, 2016, to vacate the premises. This was an astonishing position for the Landlord to take given that Bellwoods' proposed deadline almost five months away and that the Landlord was to have vacated within 30 days after May 21, 2015.

[48] On June 29, 2016, Bellwoods agreed to extend the date for the Landlord to vacate the premises to November 15, 2016, with all other terms remaining as set out in the letter dated June 3, 2016.

[49] On November 15, 2016, counsel for the Landlord wrote to say that "we have now been advised by our client that they are in the process of moving the appliance store, which is now 85% empty and are just waiting for the contractor to start. They anticipate that he will start this week."

[50] On November 17, 2016, counsel for Bellwoods wrote to counsel for the Landlord to advise that Bellwoods took the position that the Landlord was now in breach of both the lease and the June agreement. Bellwoods asked for additional information about when the Landlord would actually vacate the leased premises so that it could consider its position.

[51] On December 2, 2016, counsel for Bellwoods sent a follow-up letter to counsel for the Landlord and asked for a response to his November 17 letter. The Landlord did not respond

to this follow-up letter. When asked why he did not respond to the letters, Mr. Johnson stated that he "just didn't bother" to respond because "I never felt I was in breach of anything. I never felt there was a breach at all."

[52] On January 26, 2017, Bellwoods issued the statement of claim in this proceeding.

Conclusion

[53] The Landlord breached its obligations under s. 6.1 of the Lease. It remained in breach of those obligations from June 20, 2015, through January 26, 2017, when Bellwoods commenced this proceeding. Bellwoods repeatedly raised the breach with the Landlord. I accept the evidence of Mr. Clark who testified that Mr. Johnson kept saying he was going vacate, but never followed through on those commitments. Bellwoods always insisted that the Landlord perform the lease, even as it attempted to find reasonable ways to accommodate the Landlord. The email on September 29, 2015, the agreement reached in June 2016, and the extension of the deadline to November 15, 2016, did not waive Bellwoods' rights under the lease. In any event, the Landlord failed to abide by all of these accommodations.

[54] I do not understand why Mr. Johnson failed to vacate the space. Mr. Clark testified that Mr. Johnson told him in September 2015 that he could not vacate the leased premises because doing so would destroy his business. In his evidence at trial, however, Mr. Johnson, adamantly denied saying any such thing. He testified that vacating the space would not have been difficult and it would not have hurt his business. I do not need to resolve this factual dispute because nothing turns on it. If I accept Mr. Johnson's evidence, however, his 18-month refusal to comply with the lease makes even less sense.

[55] In his evidence, Mr. Johnson took the position that there was no reason to vacate before Bellwoods obtained the building permit. The problem with his position is that there was a reason: the clear language of the lease.

[56] From the day the Landlord signed the lease, Mr. Johnson behaved as if the lease did not exist. He repeatedly breached his promises to Bellwoods that he would vacate shortly. He breached a formal agreement that he entered into through counsel with Bellwoods. He rented out the space for the Valentine's Day party and then lied to Bellwoods about cancelling the event. Mr. Johnson also rented out the space to Vans. In closing submissions, the Landlord took the position that it did not breach the lease by renting the space to third parties because those rentals did not interfere with the construction stage. The Landlord submits that it was not required to keep the leased premises vacant.

[57] I disagree. The Landlord was required to vacate the leased premises. I see nothing in the text or structure of the lease to suggest that the Landlord could rent the leased premises to a third party even though the Landlord itself had to leave the space. Moreover, each of these events brought inventory and debris into the leased premises that were to have been removed. The Landlord's interpretation of the lease makes no commercial sense. I asked Mr. Johnson if, from his perspective, the lease permitted him to put those events into the

leased premises. He replied "I don't know. I never looked into it. I just knew the space was empty…[and thought] let's just make a little bit of money."

[58] I find that the Landlord breached s. 6.1 of the lease.

Issue three: the Landlord caused damages to Bellwoods by breaching the lease

[59] Bellwoods submits that the Landlord's breach of the lease caused it damages. Bellwoods submits that the Landlord had to vacate the leased premises as the very first step in the entire design and build process. Bellwoods was not required to deliver its plans to the Landlord until 60 days after the Landlord vacated, which never happened. The Landlord's breach of the lease brought the entire process to a halt. Bellwoods expected to be open for business in August 2016. It is now 2023. The damages to Bellwoods are obvious.

[60] The Landlord submits that it did not cause any damages to Bellwoods because the state of the leased premises did not actually interfere with Bellwoods' ability to have its professionals perform the tasks necessary to complete the design phase. The Landlord submits that the evidence is that the Landlord's failure to vacate did not actually interfere with the professionals from doing their work. To the extent that Bellwoods wanted full and unrestricted access to the leased premises to do taping and chalking, Bellwoods had no right to such access under the Lease and taping and chalking cannot have been a reasonably necessary part of the design process. I disagree with the Landlord's submissions. I find that the failure to vacate the leased premises interfered with the design process.

[61] In my view, the Landlord's breach of the lease is sufficiently substantial to justify Bellwoods' decision not to accept an inferior work-around solution. The Landlord cannot complain that Bellwoods did not give up its rights under the lease to reduce the impact on Bellwoods of the Landlord's breach of the lease.[8] The Landlord's failure to vacate the premises was an extremely serious breach of the lease for Bellwoods. The Landlord failed to exit the premises it had just leased to Bellwoods. It was extremely concerning for Bellwoods to face the prospect of embarking on an extensive and expensive program of designing and building out the space it leased while the Landlord paid no regard to the terms of the lease.

[62] In addition, the Landlord repeatedly and continually breached its obligations under the lease. I accept the evidence of Mr. Clark that he spoke to Mr. Johnson more than once about the necessity of the Landlord vacating the leased premises and that Mr. Johnson repeatedly promised that the Landlord would vacate the space only to breach those promises. The Landlord declined to answer demand letters from counsel for Bellwoods. The Landlord accepted the June 2016 agreement brokered between the lawyers, asked for a two-week extension of time to vacate to November 16, 2016, and then breached that agreement knowing that it had agreed that any breach would be a repudiation of the lease.

[8] *Bang v. Sebastian*, 2019 ONCA 501, at paras. 5 and 7; *Pearson v. Savage*, 2020 BCCA 133, at para. 77.

The repetitive or continual breaches of the Landlord's covenant to vacate make that breach extremely significant.

[63] I find that the Landlord's breach interfered with Bellwoods ability to prepare its draft plans and to complete the design process. Many of the things Bellwoods needed to do required vacant space. Mr. Clark testified that he had real fears of missing something in the design phase if the space was not vacant. He did not want to have to go back and re-do the design phase because that could lead to significant delays and cost overruns. Mr. Clark gave several examples of steps Bellwoods wished to take but that were impaired by the Landlord's failure to vacate:

a. Tape and chalk out the space to refine its design plans;

b. Assess the plumbing and electrical work that needed to be completed;

c. Take proper laser measurements of the building; and

d. Scan the floors to ensure that they were capable of supporting the heavy tanks to be installed and to determine the extent of any voids under the floors.

[64] The issue with the scanning of the floor is illustrative. Bellwoods had to obtain an engineering report to ensure that the floor could support the very large tanks it intended to install. One of the areas to be scanned was located in the portion of the leased premises that the Landlord continued to occupy and use as the furniture showroom. There was a void underneath the floor, and it was important for Bellwoods to understand the extent of the void to ensure that the floor had sufficient strength and integrity to withstand the weight of the tanks. When the scanners arrived, the Landlord was still using the space to be scanned as its furniture showroom. The Landlord's staff then proceeded to move the furniture around to create space for the scanning to take place.

[65] Mr. Clark was advised by his engineering firm that it received enough information to complete its report, but that they may have to go back later to check and confirm the extent of the void. Mr. Clark was very upset and concerned by this development. I accept his concerns. The Landlord's breach of the lease created an absurd situation. Moving furniture around a space that should have been vacated months ago to permit the floor to be scanned was an unacceptable solution that Bellwoods was not required to accept.

[66] Bellwoods offered a significant accommodation on September 29, 2015, when it asked the Landlord to do four things that would permit Bellwoods to begin producing its complete drawings. This email did not create an enforceable agreement between the parties but offered a path forward. Nevertheless, I accept the Landlord did not complete the four items on the list in a timely way (in particular, it failed respect to provide the R-value for the new windows in the glass box, did not complete digging the necessary test pits until January 25, 2016, continually occupied the leased premises, and did not leave them free of inventory and debris.) In these circumstances, it was reasonable on November 17, 2015, for Bellwoods to reiterate its demand for strict compliance with the lease.

[67] I find that the Landlord's failure to vacate caused damages to Bellwoods. The lease did not require Bellwoods to deliver plans before the Landlord vacated. The lease entitled Bellwoods to vacant space to perform its design work.

[68] The Landlord has suggested that because Bellwoods did not have the right under the lease to access the space for the purpose of completing its design, vacating was of no benefit to Bellwoods until the construction started. Therefore, the Landlord argues, Bellwoods suffered no damages. I do not accept this argument for the reasons set out in paragraphs [31] and [32] above. Moreover, if it were necessary, I would imply such a term into the lease to give business efficacy to the contract.[9]

[69] Not only did the Landlord refuse to vacate the space, it started renting out the space to third parties. I accept the evidence of Mr. Clark that he was reluctant to move forward and complete the draft plans and specifications because Bellwoods became so concerned with the third-party events such as the Valentine's Day "epic party" and the Vans skateboard park. As Mr. Clark testified,

> And it just showed me that [Mr. Johnson] is trying to rent out this building as much as possible, and that's a risk to us. I can't possibly go ahead with him still there. He's a risk to us and we need to come up with a new agreement that sees him like actually leaving before we do anything.

[70] I find that the Landlord caused damages to Bellwoods when it breached the lease by failing to vacate. It was reasonable for Bellwoods to insist that the Landlord re-commit to performing its obligations under the lease on a new timeline.

Issue four: Bellwoods is entitled to specific performance

[71] Bellwoods submits that it is entitled to an order for specific performance of the lease. The Landlord submits that Bellwoods is not entitled to such an order. For the reasons that follow, I find that ordering specific performance of the lease rather than its monetary equivalent betters serves justice between the parties.

[72] The usual remedy for breach of contract is an order for the payment of an amount of money that will provide the non-breaching party with the financial equivalent of performance.[10] However, it is inaccurate to describe the remedy of specific performance as an extraordinary remedy.[11] In determining whether or not to grant specific performance, the

---

[9] *Energy Fundamentals Group Inc. v. Veresen Inc*., 2015 ONCA 514, 388 D.L.R. (4th) 672; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd*., [1999] 1 S.C.R. 619*; G. Ford Homes Ltd. v. Draft Masonry (York) Co. Ltd*., (1984), 43 O.R. (2d) 401 (C.A.).
[10] *Lucas v. 1858793 Ontario Inc. (Howard Park)*, 2021 ONCA 52, 25 R.P.R. (6th) 177, at para. 68; *Atlantic Lottery Corp. Inc. v. Babstock*, 2019 SCC 19, 447 D.L.R. (4th) 543, at para. 50.
[11] *Dhatt v. Beer*, 2021 ONCA 137, 68 C.P.C. (8th) 128, at para. 42.

fundamental question is whether the plaintiff has shown that the land rather than its monetary equivalent better serves justice between the parties. A party seeking specific performance must establish a fair, real, and substantial justification by showing that damages would be inadequate to compensate for its loss of the subject property.[12] These principles are equally applicable to a contract for the lease of land and buildings.[13] The Landlord did not suggest that specific performance of a lease is never available, only that these circumstances do not justify that remedy.

[73] In *Lucas*, at para. 71, the Court of Appeal held that in determining whether a plaintiff has shown that property rather than its monetary equivalent better serves justice between the parties, courts should typically examine and weigh three factors: (i) the nature of the property involved; (ii) the related question of the inadequacy of damages as a remedy; and (iii) the behaviour of the parties, having regard to the equitable nature of the remedy.[14]

The nature of the property: 950 Dupont is unique because its substitute is not readily available

[74] Specific performance should only be granted where the successful party proves that the property is "unique" or, in other words, that its substitute would not be readily available.[15] Unique does not mean singular. In *Erie Sand & Gravel*, at para. 118, the Court of Appeal for Ontario put it this way:

> Where a plaintiff establishes that the land in question is unique, damages will often be inadequate, and the plaintiff has a fair, real, and substantial claim to specific performance. Land is unique if there is no readily available substitute property. One method of proving that there is no readily available substitute is to show that the land has a quality that cannot be readily duplicated, and that the quality relates to its proposed use, making the land particularly suitable for the purpose for which it was intended.[16]

[75] In *Di Millo v. 2099232 Ontario Inc*., the Court of Appeal for Ontario, following several of its own decisions, adopted the following explanation of what makes a property unique:

> [I]n order to establish that a property is unique the person seeking the remedy of specific performance must show that the property in question has a quality that cannot be readily duplicated elsewhere. This quality should relate to the proposed use of the property and be

---

[12] *Dhatt*, at para. 42; *Lucas*, at paras. 69-70; *Asamera Oil Corp. v. Sea Oil and General Corp.*, [1979] 1 S.C.R. 633, at p. 668.
[13] *Crossview Developments Inc. v. 22624443 Ontario Ltd*, 2016 ONSC 647, at para. 83.
[14] *Lucas*, at para. 71.
[15] *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, at paras. 21-22.
[16] *Erie Sand & Gravel Ltd. v. Seres' Farms Ltd*., 2009 ONCA 709, 97 O.R. (3d) 241, at para. 118.

> a quality that makes it particularly suitable for the purpose for which it was intended.[17]

[76] The uniqueness of the property is to be measured both subjectively and objectively in that a reasonable person familiar with the facts would consider the property to be unique.[18]

[77] I find that the building at 950 Dupont was unique in the sense that it has qualities that are particularly suitable for Bellwoods' intended uses and cannot be readily duplicated elsewhere. Mr. Clark testified about what made 950 Dupont a "spectacular building" in a great area:

a. The glass box had 44-foot ceilings, with a completely open central structure and a significant amount of volume, which was essential for brewing a beer in large tanks. The size of the glass box created "a giant greenhouse" that could also be lit up at night to create a dramatic effect and continual advertisement for the space.

b. It had space on the roof for a patio that could hold 300 people and a second patio on the western side of the building for 70 people. Mr. Clark had obtained the necessary approvals for the patios prior to signing the lease. Under the lease, Bellwoods would pay no rent for the approximately 7,000 square feet of patio space.

c. The building was located in central-west Toronto, which was consistent with the brand developed by Bellwoods, and in an up and coming area with high foot traffic that was close enough to Bellwoods' other location without cannibalizing its customer base.

d. The building had sufficient space and versatility that Bellwoods could use it for brewing, a restaurant, a bar, a bottle shop, and a separate events space. The lease was for 25,000 square feet plus another 12,000 square feet of patio and mezzanine space that Bellwoods would receive rent free.

e. The building had an authentic industrial aesthetic that dated to its early history in manufacturing. Under the lease, the Landlord agreed to do a significant amount of work at its own expense to bring the building up to modern standards after which Bellwoods could fixture the building to suit its specific taste.

f. It had a loading dock that would be for Bellwoods' exclusive use, which was essential for the operation of the brewery.

g. It came with 19 rent-free parking spaces with the right to access an additional 25 spaces with one week's notice.

---

[17] 2018 ONCA 1051, 430 D.L.R. (4th) 296, at para. 66.
[18] *Gillespie v. 1766998 Ontario Inc*., 2014 ONSC 6952, at paras. 2 and 32-33; *Crossview*, at para 83.

[78] Deborah Gee, an expert in event planning called by Bellwoods, expressed her view that 950 Dupont would be a very attractive venue for event planning due to a number of unique features including:

a. An authentic, hip, and cool warehouse aesthetic that provided great interior lighting due to the glass box and large open spaces that would allow persons holding events to interpret the space as a blank canvas. The exposed beams, brick, and wood provided natural elements that would be very sought after among wedding planners and other event organizers.

b. A ready tie-in between the aesthetics of the space and the brand that Bellwoods had already built.

c. The space was close to downtown and easily accessible by taxi or public transit.

d. The capacity for 280-person events, which would cause event planners to consider it a large venue;

e. It would not have any of the noise pollution constraints that come with event spaces that are connected to hotels or condominiums;

[79] I accept the evidence of Mr. Clark and Ms. Gee on these points.

[80] One weakness in Bellwoods' evidence is that it did not engage in a formal search for substitute properties for 950 Dupont after the dispute with the Landlord. Mr. Clark testified that Bellwoods wanted to make the relationship with the Landlord work and that they always hoped they could resolve the dispute and proceed with the project. While Bellwoods did not call an expert to provide opinion evidence on the comparability of other properties to 950 Dupont, I do not find that opinion evidence is necessary for me to assess this issue.

[81] The Landlord introduced evidence of approximately 30 properties in the downtown area that were available at the relevant time. Mr. Clark testified that none of those listings were suitable replacements for 950 Dupont. I agree. Many of the listings were much more suitable for retail or office spaces and did not have loading zones. The listings did not have patios or any appeal as event spaces. Many did not have the ceiling height necessary for Bellwoods' purposes. None of the properties contained a massive glass box with 44-foot ceilings.

[82] Among the unsuitable candidates, Mr. Clark identified a property at 213 Sterling Road as being the "least worst" comparable. Mr. Clark stated that it had decent volume, was in an up-and-coming neighbourhood, had some natural light, and a slab floor. However, that building had no patio space, did not have high ceilings, did not have enough space for a restaurant and event space, and may not have had a long-term lease available.

[83] I do not accept the Landlord's submission that Mr. Clark only offered broad and conclusory statements that none of the properties had all of the characteristics of 950 Dupont. Mr. Rosenstein's skilful cross-examination of Mr. Clark did not undermine the core of his

evidence that none of the other properties described in the evidence had the features of 950 Dupont. In my view, the Landlord did not identify any property that was remotely similar to 950 Dupont, with its mammoth glass box, two patios, and industrial aesthetic.

[84] While the burden is on a plaintiff to establish that the property is unique, it is notable that the Landlord did not call any witnesses to testify that there were other available properties that possessed the qualities of 950 Dupont or that Mr. Clark's subjective view of the uniqueness of the property was not objectively reasonable.

[85] I accept the evidence of Mr. Clark and Ms. Gee. I am satisfied that, from the point of view of Bellwoods, 950 Dupont had features that could not be readily duplicated elsewhere. 950 Dupont is especially suitable for Bellwoods' intended use. I also find that Bellwoods' assessment was objectively reasonable.

Damages would be an inadequate remedy

[86] The second factor to be considered is whether damages would adequately remedy Bellwoods' loss. Evidence related to the uniqueness of the property is also relevant to the adequacy of damages.

[87] I accept that courts should be reluctant to award specific performance of contracts for property purchased solely as an investment, since money damages are well-suited to satisfy purely financial interests.[19] The court must stay focussed on the fundamental question: has the plaintiff shown that the property, rather than its monetary equivalent, better serves justice between the parties? As Lax J. cautioned:

> *Semelhago* asks us to examine in each case, the plaintiff and the property. The danger in framing the issue as one of uniqueness (a term that carries with it a pre-*Semelhago* antediluvian aroma) is that the real point of *Semelhago* will be lost. It is obviously important to identify the factors or characteristics that make a particular property "unique" to a particular plaintiff. The more fundamental question is whether the plaintiff has shown that the land rather than its monetary equivalent better serves justice between the parties. This will depend on whether money is an adequate substitute for the plaintiff's loss and this in turn will depend on whether the subject matter of the contract is generic or unique.[20]

[88] Bellwoods entered into this lease for its ongoing commercial purposes. Bellwoods saw an opportunity to enhance its brand by creating a marquee space in a desirable location. Had the Landlord performed its obligations under the lease, Bellwoods would have had the

---

[19] *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, [2012] 2 S.C.R. 675, at paras. 40-41.
[20] *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd*., (2001), 56 O.R. (3d) 341 (S.C.J.), at para. 55, aff's (2003), 63 OR (3d) 304 (C.A.).

opportunity to enhance its brand and to then explore all of the other commercial opportunities that brand enhancement might have unlocked over the 30-year term of the lease.

[89] I find that damages would not be an adequate remedy. In this case, an order for specific performance would put Bellwoods in the position it would have been in if the contract had been performed.[21] In the circumstances, I find that specific performance, rather than its monetary equivalent, would better serve justice between the parties.

Bellwoods' conduct is no barrier to an award of specific performance

[90] The third factor to be considered is the behaviour of the parties, having regard to the equitable nature of the remedy.[22] Equitable relief, such as specific performance, may be refused if the party seeking relief has been guilty of misconduct in relation to the contract that party seeks to enforce.[23]

[91] I see nothing in Bellwoods' conduct that would disentitle it to equitable relief. As described above, Bellwoods repeatedly attempted to accommodate the Landlord's failure to comply with its obligations under the lease. Bellwoods provided the Landlord with many chances to find a reasonable solution. It was the Landlord, not Bellwoods, who behaved unreasonably in these circumstances.

Conclusion

[92] Bellwoods has demonstrated that the lease, rather than its monetary equivalent, better serves justice between the parties. For the reasons set out above, I order specific performance of the lease. I order the Landlord to vacate the leased premises within 30 days of the date of this judgment and to perform all of its obligations under the lease, which shall run its full term.

Issue five: the lease does not preclude an award of damages for delay

[93] The Landlord submits that Bellwoods is not entitled to claim damages arising from the Landlord's breach of the lease because the parties expressly excluded such claims in the lease.[24]

[94] To assess the Landlord's submissions on this point, it is important to recall the order of operations under the lease. Section 6.1 required the Landlord to vacate the leased premises, Bellwoods to deliver a full set of drawings, the Landlord to approve the drawings, and

---

[21] Hon. Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf, (Toronto: Thomson Reuters Canada, 2021), at §7.2; *Lucas*, at para. 68.
[22] *Paterson Veterinary Professional Corporation v. Stilton Corp. Ltd*., 2019 ONCA 746, 438 D.L.R. (4th) 374, at para. 31.
[23] *Silverberg v. 1054384 Ontario Ltd.* (2008), 2008 CanLII 59325, 77 R.P.R. (4th) 102 (Ont. S.C.), at para. 120, aff'd 2009 ONCA 698, 266 O.A.C. 216.
[24] *Zander Sod Co. v. Solmar Development Corp*., 2011 ONSC 7.

Bellwoods to apply for a single building permit. Once the City of Toronto issued the building permit, the lease contemplated the following steps (capitalized terms as defined in the lease):

a. within 120 days of receiving the building permit, the Landlord would substantially complete all Phase I Landlord's Work (at its cost) and all Landlord's Work at Tenant's cost (see s. 6.2);

b. after completion of the above, there would be a seven month Fixturing Period during which,

   i. Bellwoods would perform the Tenant's Work; and

   ii. the Landlord would substantially complete, at its cost, the Phase II Landlord's Work; and

c. after completion of the Tenant's Work and substantial completion of the Landlord's Work, Bellwoods would commence operations (the "Commencement Date").

[95] The Landlord relies on two portions of section 6.2 of the lease in support of its submission that the lease excludes damages. The exclusion clauses provide as follows:

> For clarity, the Landlord shall use commercially reasonable and diligent efforts to Substantially Complete, in an expeditious manner, the Phase I Landlord's Work and the Landlord's Work at Tenant's Cost by the date which is one hundred and twenty (120) days following the Permit Date but if the Landlord is unable to do so, then to the extent the Tenant is entitled to but unable to occupy the Leased Premises and commence construction of the Tenant's Work as a result of the Landlord's failure to Substantially Complete the Phase I Landlord's Work and the Landlord's Work at Tenant's Cost, unless such delay is caused by any act or omission of the Tenant, its contractors, agents or those for whom the Tenant is, in law, responsible, the Fixturing Period Commencement Date and the Commencement Date shall be deferred by the Landlord, this Lease shall not be void or voidable and the Landlord shall not be liable for any loss or damages whatsoever resulting therefrom.
>
> In addition, for clarity, the Landlord shall use commercially reasonable and diligent efforts to Substantially Complete, in an expeditious manner, the Phase II Landlord's Work by the date which is seven (7) months less one day following the Fixturing Period Commencement Date but if the Landlord is unable to do so, then to the extent the Tenant is unable to commence carrying on business in the Leased Premises as a result of such delay and does not otherwise open for business, unless such delay is caused by any act or omission of the Tenant, its contractors, agents or those for whom the Tenant

> is, in law, responsible or an event of Force Majeure, the Fixturing Period shall be extended and the Commencement Date shall be deferred by the Landlord, this Lease shall not be void or voidable and the Landlord shall not be liable for any loss or damages whatsoever resulting therefrom.

[96] The Landlord did not provide any cases in support of its proposition that these portions of s. 6.2 are sufficient to exclude Bellwoods' ability to claim damages in the circumstances of this case.

[97] In my view, the Landlord is characterizing s. 6.2 as a type of exclusionary clause that limits the remedies available to Bellwoods upon the breach by the Landlord.[25] As an initial step, I am required to interpret the lease and determine if the exclusion clause applies to the circumstances established in the evidence.[26] I find that the exclusion clauses do not apply in the circumstances of this case.

[98] First, the first exclusion clause only applies to losses or damages that are caused to Bellwoods by delays that occur 120 days after the Permit Date. Because the Landlord refused to vacate the leased premises, the parties never completed the drawings, applied for, or received the permit. They never reached the Permit Date and none of the damages suffered by Bellwoods occurred during the 120 days after the Permit Date.

[99] Second, the first exclusion clause only applies to damages resulting from the Landlord's failure to complete the Phase I Landlord's Work and Landlord's Work at Tenant's Cost in the specified time. The Landlord never commenced the Phase I Landlord's Work and Landlord's Work at Tenant's Cost. In this case, Bellwoods' damages do not arise from the Landlord's failure to complete that work and in the words of the exclusionary clause, Bellwoods' damages are not "resulting therefrom."

[100] Third, even if the first exclusionary clause could apply to the damages suffered by Bellwoods (and I find that it does not), the Landlord cannot benefit from this clause as it did not use "commercially reasonable and diligent efforts" to complete the work. The Landlord behaved in a commercially unreasonable way when it refused to vacate the leased premises. It made no efforts, much less diligent efforts, to comply with its obligations under the lease. I do not think the parties expressed in the lease that they intended to insulate the Landlord from a claim for damages arising from its commercially unreasonable and unilateral actions. Much clearer language would be required in order to restrict the remedies against the Landlord when it acted arbitrarily and without any basis in the rights conferred on it in the lease.[27]

---

[25] *1465152 Ontario Ltd v. Amexon Development Inc*., 2015 ONCA 86, at para. 11.
[26] *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 121 to 123.
[27] *Amexon*, at para. 17.

[101] Fourth, the exclusion clause relied on by the Landlord is found in s. 6.2 of the lease. If the parties intended to exclude a claim for damages arising from the obligations in s. 6.1 to vacate the premises, deliver the draft plans, approve the draft plans, or apply for the permit, I would have expected to see an exclusionary clause within s. 6.1. The parties did not include any exclusionary language within s. 6.1. I accept that s. 23.11 of the lease provides that section numbers in the lease are inserted only as a matter of convenience. However, I see nothing in the text of the exclusion clause in s. 6.2 to suggest it applies to delays arising from a breach of s. 6.1.

[102] Fifth, the fact that the parties included two separate exclusion provisions on s. 6.2, one for each of the Phase I and Phase II Work, suggests that they did not intend to provide a blanket or omnibus exclusion for damages arising from any delay or for any cause. Rather, they drafted two separate and specific exclusions clauses designed only to apply in each of two specific sets of circumstances.

[103] The same reasons apply, with appropriate modifications, to the second exclusion clause.

[104] For all of these reasons, I find that nothing in s. 6.2 excludes Bellwoods' claim for damages arising from the Landlord's breach of its obligation to vacate.

Issue six: Bellwoods is entitled to damages for the period from August 2016 to trial

[105] Although, I have awarded specific performance of the lease, Bellwoods is also entitled to damages caused by the delay in its operations at 950 Dupont calculated based on the time value of money. Had the Landlord vacated the lease as required, I find that Bellwoods would have opened a brewery, public event space, retail beer store, restaurant, and bar at 950 Dupont in August 2016.

[106] Bellwoods called Jacob Dwytie of PwC to provide opinion evidence on Bellwoods' lost profits, assuming that Bellwoods will begin operations on June 1, 2024.

[107] The Landlord accepted that, in principle, Bellwoods' approach to damages was sound. It did not call an expert either to provide a different opinion or to critique Mr. Dwytie's opinion. The Landlord challenged a number of Mr. Dwytie's assumptions, which I will address below, but did not call any witnesses to provide evidence that the business plan of Bellwoods was not realistic or that there was any reason to believe that Bellwoods would not be as successful at 950 Dupont as it has been at that Ossington location.

Dwytie Opinion

[108] Mr. Dwytie prepared four reports for use in this proceeding:

a. The report dated November 29, 2019, was the primary report that calculated the loss as a result of the delay in the opening of 950 Dupont. The loss was calculated based on the time value of money based on an assumed opening date of January 1, 2021.

b. The report dated September 16, 2021, contained a number of updates. It changed the expected opening date from January 2021 to April 2023, corrected certain errors regarding the cost of producing certain types of beer and the sale price for that beer, updated information on Bellwoods' financial performance, adjusted but-for income and actual income for the effects of the COVID-19 pandemic, and incorporated information regarding the expected incremental profits from the planned event space.

c. The report dated January 17, 2022, updated calculations based on the ongoing effects of the COVID-19 pandemic and additional initial capital expenditure requirements for the build out.

d. The report dated February 1, 2023, updated the calculations based on changing the expected opening date from April 2023 to June 1, 2024.

[109] Mr. Dwytie's opinion contained three different scenarios, two of which assumed that the court would not order specific performance of the lease. Given my decision to order specific performance of the lease, I will not consider or refer to the other two scenarios.

[110] I will consider Mr. Dwytie's reports together and incorporate the corrections and revised assumptions as necessary.

The specific performance scenario

[111] Under the specific performance scenario, Mr. Dwytie assumed that but for the Landlord's breach of the lease, Bellwoods would have opened 950 Dupont on August 1, 2016, and operated there until the conclusion of the lease term on July 1, 2046. He compared that scenario to one where Bellwoods will open on June 1, 2024, and operate until May 30, 2054. In this scenario, the damages arise because of the delay in Bellwoods earning its income at 950 Dupont. Mr. Dwytie explains the losses arising from the time value of money as follows:

> Under specific performance, the loss has been calculated as a result of the delay in completing the landlord's work under the Lease Agreement. That is, the loss has been calculated based on the time value of money. The forecasted income at the Dupont Property but for the [Landlord's breach of the lease] has been calculated assuming an opening date of August 1, 2016 and a 30-year lease term, which assumes that Bellwoods would have exercised the two options to extend the Lease Agreement. The forecasted actual income assumes that under specific performance, the landlord's work would be completed, and Bellwoods would be allowed to open the Dupont Property on [June 1, 2024]. The calculated difference in timing of income has been discounted to August 1, 2016, using the weighted average cost of capital ("WACC") for Bellwoods. (internal citations omitted).

[112] Mr. Dwytie assumed that Bellwoods would earn income at 950 Dupont from four different revenue streams: restaurant revenue; bottle shop revenue; wholesale revenue; and event revenue. He then estimated the but-for gross profits earned from each revenue stream from August 2016 to June 1, 2024.

[113] The Landlord accepted this approach to damages. It challenged only a few of the assumptions Mr. Dwytie used to calculate each revenue stream, which I will address below.

Restaurant revenue

[114] Bellwoods intended to operate a restaurant at 950 Dupont. Mr. Dwytie assumed that the restaurant would have 180 indoor seats, plus 70 seats on the ground floor patio and 232 seats on the roof top patio. He further assumed that the patios would only be open for half of April, May through September, and half of October each year.

Liquor licence

[115] The Landlord submits that Bellwoods has not proved that it would ever have opened a restaurant at 950 Dupont because Bellwoods needed a liquor licence to operate that restaurant and there is no evidence that it would have received a licence.

[116] Mr. Johnson testified that he had been approached by many families wanting to host weddings and other events but that the Landlord could not accommodate them because they needed a liquor licence. Mr. Johnson also testified that "I didn't think [Bellwoods] had a hope because I'd applied a hundred times and couldn't get [a liquor licence]."

[117] In my view, the evidence demonstrates that it was more likely than not that Bellwoods would be able to obtain a liquor licence for a restaurant at 950 Dupont.

[118] First, on August 26, 2014, the City of Toronto Committee of Adjustment (Toronto and East York District) granted a minor variation at 950 Dupont to Bellwoods to permit the manufacture of beer with associated uses of a retail establishment and a restaurant/eating establishment, including the two patios. This removed at least one significant barrier to obtaining a liquor licence for the restaurant, which was to be an associated use of the brewery.

[119] Second, Bellwoods had a demonstrated track record of being able to obtain and maintain a liquor licence for a restaurant associated with a brewery.

[120] Third, the reason that Bellwoods wanted to enter a 30-year lease at 950 Dupont was because of the opportunities that space presented to earn additional revenue through the restaurant and event spaces, both of which would require a liquor licence. Without the opportunities to generate that revenue, Bellwoods would not have leased 950 Dupont but would have chosen less expensive space just to brew beer. Bellwoods anticipated investing $5 million of capital into Dupont. I do not accept that Bellwoods would have taken on the risk of the lease and the associated capital expenditures if there was a material risk that it would not be able to obtain a liquor licence for the space.

[121] Fourth, the Landlord did not cross-examine Mr. Clark on whether or not he believed he would be able to obtain a liquor licence. The Landlord did not tender any evidence that Bellwoods (as opposed to unnamed renters and families who may or may not have had Bellwoods' track record of responsible licensure) would not be able to obtain a liquor licence.

[122] In conclusion, I am satisfied that Bellwoods has proved that it is more likely than not that it would be able to obtain a liquor licence for a restaurant at 950 Dupont.

Access to capital

[123] Mr. Clark and Mr. Dwytie agreed that Bellwoods would need to invest about $5 million of capital to realize its plans for 950 Dupont. The Landlord submits that there is no evidence that Bellwoods had access to that amount of capital. Moreover, because Bellwoods did not invest more capital more quickly into its operations at Hafis Road, the court should infer that Bellwoods did not have access to that capital.

[124] I do not accept this argument. First, Bellwoods signed a 20-year lease for 950 Dupont. It would be extremely risky for Bellwoods to do so without the ability to access or raise the capital necessary for the investments required for that undertaking. I would be reluctant to draw that inference without clear and convincing evidence on that point. Second, Mr. Clark was not cross-examined on whether or not he had access to the capital necessary for the improvements required at 950 Dupont. Third, the Landlord led no direct evidence to suggest that Bellwoods could not access the necessary capital.

[125] In these circumstances, I am not prepared to infer that Bellwoods could not raise the capital necessary to develop 950 Dupont.

Number of seats

[126] The Landlord submits that Bellwoods did not prove that the restaurant at 950 Dupont could have 180 indoor seats and that there is no evidence that the restaurant could have that many seats. Indeed, the Landlord submits, the only architectural plan that attempts to establish the number of seats in the restaurant is one that shows 57 seats. I do not accept the Landlord's submissions.

[127] First, it is uncontested that the restaurant had a legal occupancy limit of 180 persons. Second, Mr. Clark testified that he turned his mind to how many people would be accommodated at the restaurant, and he planned for 180 people. Third, Mr. Clark testified that his architect, Eric Chung, calculated that Bellwoods could seat 180 people in the restaurant, that Bellwoods used these calculations for its planning, and that Bellwoods intended to maximize seating in the restaurant. Fourth, the architectural plan that shows only 57 seats was designed to accommodate the seating restrictions in place from time-to-time during the COVID pandemic and was not intended to be used once those restrictions were lifted. I accept all of this evidence.

[128] On the other hand, the Landlord did not lead any evidence tending to show that 180 persons could not be accommodated in the restaurant space. The burden is on the plaintiff to prove their damages. However, given the evidence set out above, there is at least a tactical burden on the Landlord to lead some evidence to counter the weight of Bellwoods' evidence.

[129] I am satisfied that Bellwoods has proved on a balance of probabilities that the restaurant could accommodate 180 people and that Mr. Dwytie was entitled to rely on that assumption in his report.

Calculation of revenue

[130] To project the gross profit of the restaurant at 950 Dupont, Mr. Dwyite used the historical 2016 and 2017 results of Bellwoods' Ossington location on a revenue-per-seat basis, calculated on a monthly basis to account for seasonal variation and available seating.

[131] Mr. Dwytie recognized that the smaller Ossington venue constantly operated at capacity due to its location in a high foot-traffic location and that 950 Dupont might experience a lower per-seat revenue. On the other hand, 950 Dupont would have a much larger menu that would likely drive higher food sales and lunch traffic. Mr. Dwytie concluded that these trends would likely offset each other, and he thought it was reasonable to assume the Ossington and 950 Dupont locations would generate the same revenue per seat. To estimate the cost of goods sold for restaurant food and non-alcoholic beverage revenue at 950 Dupont, Mr. Dwytie used the historical cost of good sold as a percentage of revenue at the Ossington location. The Landlord did not challenge this approach in its closing submissions.

[132] I accept Mr. Dwytie's approach to the calculation of restaurant revenue.

Bottle shop revenue

[133] Bellwoods intended to sell some its beer from a retail bottle shop at 950 Dupont.

[134] The Landlord challenges Bellwoods' claim for damages arising from the lost revenue from the bottle shop. The Landlord submits that Bellwoods' own evidence at trial is that a brewer may only operate two bottle shops. Because Bellwoods already operated bottle shops at its Ossington and Hafis locations, it could not have opened a third bottle shop at 950 Dupont. In addition, the Landlord submits that there is no evidence that the bottle shop at 950 Dupont would have been more profitable than either of Bellwoods' other two bottle shops and, therefore, there are no incremental damages from the inability to open a bottle shop at 950 Dupont.

[135] The evidence on this point is not entirely satisfactory.

[136] Mr. Clark testified that Bellwoods intended to open a bottle shop at 950 Dupont. He also testified that Bellwoods operated bottle shops at the Ossington and Hafis locations. During the cross examination of Mr. Clark, the Landlord did not question ask Mr. Clark if Bellwoods could legally open, directly or indirectly, a third bottle shop. Counsel only

confirmed with Mr. Clark that he would have needed a liquor licence to operate the restaurant and bottle shop and that the retail fridge shown on the design plans was to accommodate the bottle shop.

[137] Mr. Dwytie's opinion addressed this issue in a footnote of his report. He advised that the Alcohol and Gaming Commission of Ontario "allows breweries to have up to two on-site retail stores located at production sites. We understand that when the Dupont Property opens, the Hafis retail shop can be opened under a separate corporation in order to accommodate the AGCO's limit of two retail stores."

[138] The Landlord cross-examined Mr. Dwytie on his assumption. Counsel took Mr. Dwytie to the Alcohol and Gaming Commission of Ontario "Brewery Retail Store Information Guide, July 2018", and then asked the following questions:

> Q. Okay. You'll see in the third paragraph on the page in general information, that a brewery retail store must be located in the same parcel of land as the production site, and that a brewery is limited to two stores across all of its production facilities. And, you – you realized that as part of your report?
>
> A. Yes, and I – I discussed that with management, and – and that's how I came to the understanding that they could structure their business in a way that they could have more than two retail stores.
>
> Q. All right. And – and what's your – what's the basis on which you've reached that conclusion, apart from this document, which says they are limited to two retail stores?
>
> A. So, my understanding is that they could, for example, create a subsidiary, and that subsidiary would, itself, be entitled to two retail stores, or, alternatively, you know, they could spin it out, so to say, so that it's a separate business with common shareholders. So, there's a way to organize the business in a way that – that this isn't, actually, as limiting as it might seem.
>
> Q. Okay.
>
> A. That's my understanding.

[139] Unfortunately, I did not hear any evidence from Mr. Clark on Bellwoods' plans and how it intended to comply with the regulatory requirements. I was also not provided the statutes or regulations that underpin the advice contained in the AGCO commission information guide.

[140] Based on the evidence before me, I am not prepared to disallow entirely the claim for damages arising from the deferred bottle shop revenue.

[141] First, in the absence of evidence from Mr. Clark on this point, I am reluctant to conclude that there is not a business solution that would allow Bellwoods to run, directly or indirectly, a third bottle shop. I am satisfied that he was alive to the issue because of Mr. Dwytie's report and his evidence on this point. The bottle shop is a central feature of Bellwoods' business plan and he should have been offered an opportunity to address this issue directly.

[142] Second, I have no doubt that the bottle shop at 950 Dupont would sell a higher volume of bottles than would the Hafis location. Bellwoods sells a total of 3,000 hectolitre of beer through its bottle shops at Ossington and Hafis. Based on the features of the 950 Dupont location, Mr. Dwytie estimated that Bellwoods would sell 2,000 hectolitres of beer at its bottle shop at 950 Dupont. Even if Ossington and Hafis each sold 1500 hectolitres through their bottle shop, and there was no direct evidence on this point, Mr. Dwytie estimated that Bellwoods would sell 33% more at 950 Dupont than it did at each of those other locations.

[143] Moreover, I infer from Mr. Clark's evidence that the bottle shop at Ossington sold much more volume than the bottle shop at Hafis. Mr. Clark repeatedly described the Hafis location as having a "little bottle shop and tasting room" and that the Hafis location was an "industrial site" in an industrial area. It did not have a kitchen. It did not have a restaurant or a patio that would attract patrons who might then visit the bottle shop on their way home. Mr. Clark testified that "There isn't much foot traffic. It's not really on good transit, but it's a great industrial building for production."

[144] Even if Bellwoods had to close the bottle shop at Hafis to open the bottle shop at 950 Dupont, I think it is likely that that Bellwoods would sell a total of 4,000 hectolitres of beer through the bottle shops at Ossington and 950 Dupont, compared to 3,000 at Ossington and Hafis.

[145] In addition, Mr. Clark testified that there has consistently been more demand for Bellwoods' beer than it can produce. He stated that if Bellwoods could produce more beer, they would be able to sell in more LCBO stores, through exporters to the United States, and through licensees.

[146] If Bellwoods had to close the bottle shop at Hafis to open the bottle shop at 950 Dupont, I think it is very likely that Bellwoods could sell the bottles they would have sold at the Hafis bottle shop through LCBO stores, through exporters to the United States, and through licensees.

[147] For these reasons, I award damages to Bellwoods in respect of the deferred bottle shop revenue. However, the uncertainty of the evidence around the licencing issue is one of the reasons that I will choose the low end of the range of damages calculated by Mr. Dwytie.

Wholesale revenue

[148] Mr. Dwytie assumed that Bellwoods would produce 1,000 hectolitres of beer at 950 Dupont for wholesale bottle and keg sales.

[149] The Landlord submits that Bellwoods has mitigated its damages by establishing the Hafis location, which initially brewed 3,000 hectolitres a year and has increased that production to 15,000 hectolitres per year. If Bellwoods wanted to brew more beer for wholesale, it could have and should have done so at the Hafis location. Having chosen the amount of beer it wanted to brew at Hafis, which the Landlord submits was constrained by the market and Bellwoods' access to capital, it cannot seek any additional damages.

[150] When Bellwoods leased 950 Dupont, it knew that it did not want to dedicate its valuable space to storage. Bellwoods decided to lease a third property for brewing, storage, and shipping. In November 2015, Bellwoods signed a lease for space in an industrial area on Hafis Road. Bellwoods took possession of Hafis in January 2016, when it was still very confident that they would be moving in to 950 Dupont. Bellwoods needed to decide how to build out Hafis in that fluid environment. Bellwoods submits it acted reasonably in building out Hafis the way it did. By doing so, it mitigated its damages. However, Bellwoods also submits that there is not enough space at Hafis to brew additional beer. Bellwoods needs more space to brew more beer to meet the ongoing unmet demand. If Bellwoods had 950 Dupont, they would be brewing more beer, which they could allocate to wholesale.

[151] I accept Bellwoods' submissions on this point. The facts do not support the Landlord's submission that Bellwoods did not mitigate its losses. I find the Bellwoods' approach to building its facilities at Hafis was reasonable. Bellwoods has demonstrated that there continues to be unmet demand for its beer. Bellwoods' ability to meet this demand has been seriously harmed by not having access to 950 Dupont. The Landlord has not proven that Bellwoods failed to mitigate its damages.

Event space revenue

[152] Bellwoods intends to use 950 Dupont as an event space to host private events such as weddings and corporate parties and events.

[153] Bellwoods retained Deborah Gee to provide an opinion on the revenue Bellwoods could expect to generate by using 950 Dupont as an event space. I qualified her as an expert. In her opinion, the event space at 950 Dupont would primarily be used for weddings, but would also be appealing to corporate clients and small to medium sized businesses for their events. Ms. Gee anticipated that Bellwoods would supply only the space and the beer, with few additional costs. It would be the responsibility of the event hosts, through their own event planners, to arrange for catering, staffing, and event infrastructure. To generate revenue, Bellwoods would charge fees to rent the building and a 20% "landmark fee," which is a percentage of all amounts spent by the event hosts on third party food, beverages, staffing, and supply rental.

[154] The Landlord made two fundamental challenges to Ms. Gee's opinion.

[155] First, the Landlord submits that Ms. Gee concluded that any "large 'cool' venue" in the area would have an equal chance of succeeding. Therefore, the Landlord submits,

Bellwoods could have mitigated its damages by finding some other space to operate an event space. I disagree. In my view, Ms. Gee's opinion remained firmly anchored in the unique features of 950 Dupont. Her opinion made this point persuasively:

> The rooftop terrace is a huge selling feature, particularly for the wedding market. Venues that can offer a mix of indoor and outdoor space are very appealing to clients; outdoor event space is typically preferred for special occasions but comes with the risk of inclement weather, which the indoor option at 950 Dupont mitigates.
>
> 950 Dupont is an old industrial building, almost entirely covered in windows. Unique locations with character are very popular in the events industry, particularly for weddings. Guests are looking for the "Instagramable moment" and immersive experience that is not the usual, stiff, classic venue often found in the hotel and conference market. Venues that are unique, historical and restored, tend to attract a wider range of guests. The windows also offer a significant amount of natural indoor lighting, which clients and guests generally find appealing.
>
> In addition to the attractive physical characteristics of the building itself, I understand that Bellwoods intends to have brewing equipment in the building, including large wooden vats known as "foeders", used for aging beer. These foeders would contribute to the property's unique aesthetic. I am aware that Bellwoods is a popular local craft beer and craft beer enthusiasts will travel to a brewery to seek out the craft beer experience. Brewing facilities have become a destination for locals and tourists alike. This aspect of the venue would increase the appeal of the event space at 950 Dupont. Unique venues such as breweries in unexpected locations are very "on trend" at present and appeal to customers.
>
> In summary, this venue is well placed to be very popular and fill a void in the event market in Toronto. The city is very short on venues that can host events of more than 150 guests and are close to downtown. 950 Dupont offers both of these features, as well as a popular brand and unique physical space. I would expect the space to receive immediate interest from companies and people looking for venues for events.

[156] For the reasons set out above in the section on specific performance, I accept that 950 Dupont is a unique property. Ms. Gee's report makes clear that these same unique features underpin her assessment of the likely success of the event space at 950 Dupont. There is no evidence that any other event space is comparable or an efficient substitute for 950 Dupont.

[157] Second, the Landlord submits that event spaces only work when they are properly managed. The Landlord submits that Ms. Gee and Mr. Dwytie do not properly assess or account for that risk. While I accept the need for good management, I disagree that the experts did not account for this risk.

[158] Mr. Clark testified that Bellwoods intended to hire two professional event coordinators to run the event space for Bellwoods. Mr. Dwytie included these overhead costs in his damages calculation. The evidence does not support an inference that Bellwoods would hire unskilled persons to run the events space. Based on the evidence before me, including Ms. Gee's report, I am satisfied that Bellwoods would be able to establish a successful event space at 950 Dupont.

[159] The Landlord did not call any evidence to counter Ms. Gee's assumptions, projections, comparisons, or calculations. There is no competing evidence before me regarding the revenue Bellwoods would earn from the event space. Ms. Gee's evidence was not undermined on cross-examination. I find that Ms. Gee's estimates and assumptions are reasonable and, in some places, conservative. Her work, and in particular, her careful segmentation of the year (and even the days of the week) into high and low revenue and booking seasons was thorough and persuasive. I accept Ms. Gee's evidence and opinion.

[160] Ms. Gee determined that Bellwoods could expect to generate $2,824,785 of annual gross revenue from using 950 Dupont as an event space. Mr. Dwytie then took this number and incorporated it into his analysis of Bellwoods' damages calculated based on the time value of money. To avoid double-counting revenue, Mr. Dwytie removed profits that Bellwoods could otherwise have generated by using the event space for the restaurant or bar operations.

Methodology and discount rate

[161] Mr. Dwytie estimated the revenue less the cost of goods sold that Bellwoods would have earned from each revenue stream from August 1, 2016, to June 1, 2024. He also estimated operating expenses for 950 Dupont based on Bellwoods' actual expenses, scaled up for the size of the operation. He then discounted the calculated difference in timing of income to August 1, 2016, using the weighted average cost of capital for Bellwoods. Mr. Dwytie explained that the weighted average cost of capital is:

> an overall required rate of return, which takes into account the required rate on return of all forms of invested capital (i.e. cost of debt and cost of equity capital) as at August 1, 2016. It is the rate of return indicative of the investment risk inherent in the ownership of the entire business enterprise, inclusive of all of its assets, tangible and intangible, current and long-term.

[162] Based on his analysis and in the exercise of his professional judgment, Mr. Dwytie established a discount rate of 12.50% to 17.50%. Applying these discount rates, Mr. Dwytie reached a high and a low total of Bellwoods damages.

[163] The Landlord's primary objection to Mr. Dwytie's methodology is that he did not sufficiently factor into his analysis the "substantial risk that this new restaurant would not survive." I do not accept the Landlord's submission because Mr. Dwytie incorporated risk into his assessment in several ways.

[164] First, he selected a beta of 0.88, which was derived from the observed betas for guideline public companies for full service restaurants. Mr. Dwytie testified that including this element in the calculation served to capture the industry-wide risks of opening and running restaurants. The risk of enterprise failure, Mr. Dwytie testified, was captured in his assessment of the appropriate beta to be incorporated in the weighted average cost of capital. Mr. Dwytie testified that the beta was drawn from industry reports for public companies running full service restaurants. He testified that this was appropriate because the purpose of the beta was to reflect risks that the entire industry would enjoy economic growth or suffer economic decline.

[165] Second, Mr. Dwytie also considered the incremental risk posed by Bellwoods' specific operation and applied a company-specific risk premium in the range of 1.5% to 7.5%. Mr. Dwytie explained his reasoning as follows:

> A company specific risk adjustment may be appropriate to consider, including whether the subject company's risk characteristics are greater or smaller than the typical risk characteristics of the comparable companies. Adjustments may be based on an analysis of company-specific factors, including risks associated with achieving forecast operating results. We have included a company specific premium range of 1.5% to 7.5% for Bellwoods for the following reasons:
>
> a. Factors that increase risk:
>
> - The Dupont Property is an unproven location without a track record;
> - All of Bellwoods' locations would be concentrated in the City of Toronto, increasing economic downturn risks if the region's economic outlook becomes negative.
> - Potential cannibalization of sales.
>
> b. Factors that decrease risk:
>
> - Bellwoods is an established brand name in the City of Toronto; and,
> - Diversified revenue streams (i.e., wholesale brewing, bottle shop, event space, and restaurant).

[166] The Landlord did not call an expert to provide evidence that the beta selected by Mr. Dwytie was inappropriate or that he should have selected a company specific risk-premium. There is no evidence before me that a different beta would be more appropriate or even how I should adjust the beta to better reflect the industry wide risks. Counsel for the Landlord cross-examined Mr. Dwytie on these points, but did not obtain a concession from Mr. Dwytie that a higher risk premium would be more appropriate. I find that Mr. Dwytie's evidence was not undermined during cross-examination, and I accept his conclusions.

[167] The cross-examination, however, effectively highlighted the risks associated with the Bellwoods' business plan. For this reason, and to reflect my early conclusion about the bottle shop revenue, I find that the discount rate at the high end of Mr. Dwytie's range is the most appropriate one to use to calculate damages for both the event space and the balance of Bellwoods' operations at 950 Dupont. I will award damages at the low end of the range.

Conclusion

[168] I accept Mr. Dwytie's opinion regarding the range of economic loss suffered by Bellwoods as a result of the Landlord's breach of the lease. I select damages at the low end of the range he calculated and award Bellwoods $1,590,000 in damages for the period from August 1, 2016, to June 1, 2024, excluding pre-judgment interest.

[169] In addition, I accept Ms. Gee's opinion on Bellwoods' expected revenue from the event space. I also accept Mr. Dwytie's opinion on the incremental income loss associated with the deferred access to that space. I award Bellwoods $4,520,000 in damages for the period from August 1, 2016, to June 1, 2024, excluding pre-judgment interest.

The Landlord's counterclaim

[170] The Landlord brought a counterclaim against Bellwoods seeking a declaration that Bellwoods has fundamentally or materially breached the lease. The Landlord sought damages in excess of $2 million. The Landlord calculates this amount as the foregone rent calculated at the base rental rate ($515,000 per year) from March 2017 (the date the Landlord defended the action) until March 2021, when it leased the premises to another tenant.

[171] As explained above, the Landlord violated the lease by failing to vacate. Bellwoods did not violate the lease as it was not required to deliver its plans until 60 days after the Landlord was required to vacate the leased space.

[172] I dismiss the Landlord's counterclaim.

The Lennard Commercial Realty action

[173] In a separate action, Lennard Commercial Realty sued Mr. Johnson, the Landlord, and a related corporation for failing to pay commission on the lease.

[174] The contract for the payment of the commission is set out in a letter from James Russell, the principal of Lennard, to Matthew Stesco and Timothy Clark of DTZ. It reads as follows:

> This is to confirm that in the event that Bellwoods Brewery or any of its subsidiaries ("Bellwoods") is represented by Lennard Commercial Realty. Brokerage ("Lennard") and enters into a lease agreement and occupies space in 950 Dupont Street. Toronto. Ontario ("Premises 1080414 ONTARIO LTD ("Landlord") shall pay Lennard via its agent DTZ Canada Inc a commission as follows
>
> Years 1-10 $1 00 per square foot of total rentable area for each year of the lease term.
>
> Years 10-15 $0.60 per square foot of total rentable area for each year of the lease term.
>
> Years 16-20: 50 40 per square foot of total rentable area for each year of the lease term
>
> There shall be no deduction for any inducements such as free rent. turnkey provisions or cash allowance Lennard shall be paid 100% of the commission upon occupancy of the Premises by Bellwoods.

[175] Lennard calculates that it is owed $425,250 under the commission agreement.

[176] The defendants to the Lennard action submit that the commission is not due and payable because Bellwoods has not yet occupied the premises. Lennard submits that the only reason that Bellwoods has not occupied the leased premises is because the Landlord breached its lease with Bellwoods. Lennard submits that it would be commercially absurd to permit the defendants to avoid paying Lennard simply because the Landlord breached the lease and refused to permit Bellwoods to occupy the premises. I disagree.

[177] The language of the commission agreement is clear. For Lennard to earn a commission, Bellwoods had to do two separate things: first, enter into a lease agreement with the Landlord; and, second, occupy the space. The contract provides that a commission will be paid “in the event that Bellwoods…enters into a lease agreement and occupies space in 950 Dupont Street.”

[178] Lennard’s interpretation of the contract gives no meaning to the words “and occupies space in 950 Dupont.” In my view, the parties’ intentions as expressed in the contract were that unless and until Bellwoods occupied the space, no commission was owed to Lennard. I am not prepared to imply a term into the contract that would see Lennard paid a commission

without Bellwoods occupying the leased premises. The court may not imply a term that contradicts the express language of an agreement.[28]

[179] Lennard drafted the commission agreement. If it wanted to be entitled to a commission upon the signing of the lease, it needed to use different language than the language it chose. The contract allocates the risk that Bellwoods would not occupy the space to Lennard, not to the defendants to the Lennard action.

[180] I find that the defendants did not breach the commission agreement by failing to pay Lennard the commission. I dismiss Lennard's action.

[181] I note, however, that because I have granted specific performance, Bellwoods will likely occupy the leased premises in the future. If and when Bellwoods occupies the leased premises, the defendants to the Lennard action may well be required to pay the commission in the agreement. Nothing in these reasons should be interpreted as relieving the defendants to the Lennard action of such potential liability.

Conclusion

[182] I find that the Landlord breached the lease by failing to vacate the leased premises and order that the Landlord:

a. specifically perform the lease, which will run its full term;

b. vacate the leased premises within 30 days of the date of this judgment;

c. pay to Bellwoods $6,110,000 in damages; and

d. pay prejudgment interest on the damages from August 1, 2016, to the date of this judgment.

[183] I dismiss the Landlord's counterclaim.

[184] I dismiss Lennard's action without prejudice to its rights under the commission agreement if Bellwoods occupies the leased premises in the future.

[185] If the parties are not able to resolve costs of this action, Bellwoods may email its costs submission of no more than five double-spaced pages to my judicial assistant on or before May 18, 2023. The Landlord may deliver responding submissions of no more than five double-spaced pages on or before May 25, 2023.

[186] Given that Lennard's action consumed virtually no time at trial, I urge the parties to resolve the costs of that action. If they are not able to do so, the defendants to the Lennard action may submit their costs submissions of no more than three double-spaced pages to my

[28] *G. Ford Homes Ltd. v. Draft Masonry (York) Co. Ltd*., (1984), 43 O.R. (2d) 401 (C.A.).

judicial assistant on or before May 18, 2023. Lennard may deliver responding submissions of no more than three double-spaced pages on or before May 25, 2023.

[187] No reply submissions are to be delivered without leave.

Robert Centa J.

Released**:** May 11, 2023

CITATION: Bellwoods Brewery Inc. v. 1896841 Ontario Limited, 2023 ONSC 2845
COURT FILE NO.: CV-17-568431
DATE: 20230511

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Bellwoods Brewery Inc.

Plaintiff
(Defendant to the counterclaim)

– and –

1896841 Ontario Limited

Defendant
(Plaintiff by counterclaim)

AND BETWEEN:

Lennard Commercial Realty

Plaintiff

– and –

1080414 Ontario Ltd., 1896841 Ontario Limited, and Pat Johnson

Defendants

REASONS FOR JUDGMENT

R. Centa J.

Released: May 11, 2023