CITATION: 1000124505 Ontario Inc. v. 2141632 Ontario Inc., 2023 ONSC 6070
COURT FILE NO.: CV-23-00000058-0000
DATE: 20231026

SUPERIOR COURT OF JUSTICE – ONTARIO

2023 ONSC 6070 (CanLII)

RE: 1000124505 Ontario Inc., Plaintiff

AND

2141632 Ontario Inc., Defendant

BEFORE: Justice Spencer Nicholson

COUNSEL: M. Odumodu and A. MacDonald, for the Plaintiff

J. Downing and J. Masterman, for the Defendant

HEARD: June 9, 2023

REASONS ON A MOTION FOR AN INTERIM INJUNCTION

NICHOLSON J.:

Nature of the Motion:

[1] This motion concerns the Hills Golf course, located in Mount Elgin, Ontario.

[2] The plaintiff, 1000124505 Ontario Inc., is the corporate entity that operates Oxford Hills Golf. I will refer to the plaintiff as "Oxford Hills Golf". The two key principals for Oxford Hills Golf are Michael Sherman and Adam Hagen.

[3] The defendant, 2141632 Ontario Inc., was the owner of the property upon which Hills Golf course is located. For sake of ease, I will refer to the defendant as the "Owner". The Owner is controlled by Stephen Bohner.

[4] The parties entered into a Lease Agreement, whereby Oxford Hills Golf (the "Lessee") would manage the golf course for the Owner (the "Lessor"). Oxford Hills Golf would pay $20,000 plus HST per month in rent and there was a 50-50 profit-sharing arrangement. The Lease commenced on April 1, 2022.

[5] For the 2022 golf season, Oxford Hills Golf operated the golf course pursuant to the Lease Agreement. Beginning in September 2022, Mr. Bohner began raising various concerns and a notice of default was sent to Oxford Hills Golf in February 2023 alleging many acts of default. Then, on March 28, 2023, the Owner purported to terminate the Lease Agreement.

[6] Accordingly, Oxford Hills Golf sued the Owner for damages and moved for an injunction granting it possession of the golf course. After hearing the motion, I made an interim order maintaining the *status quo*, which at that time was the Owner operating the golf course and reserved my decision.

[7] In doing so, I was fully aware that any order made between the date of hearing this motion and the end of the golf season that resulted in a change in management mid-season would disrupt the current season's operations. Realistically, that was not a viable option. Accordingly, I chose to wait until the end of the golfing season to release this decision.

[8] The motion record contained several competing affidavits. There were also cross-examinations conducted resulting in lengthy transcripts. The court reviewed and considered all of this substantial evidence in coming to the within decision.

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<u>Review of the Evidence*:*</u>

[9] The golf course was purchased by the Owner in August of 2020. Mr. Bohner deposes that he personally invested approximately $16 million into the golf course in the hopes of making it a "vacation destination". The improvements to the property included upgrades to the golf course, constructing a new clubhouse with a large restaurant and building a "Nordic Spa".

[10] Mr. Sherman was hired as the general manager for the Owner and managed the golf course and the restaurant located on the same property. Mr. Sherman reported directly to Mr. Bohner.

[11] In the summer of 2021, Mr. Hagen was recruited as a member of the team. According to the affidavit in support of the plaintiff's motion, Mr. Hagen was very well known in the golf community with considerable experience managing premier golf clubs in Ontario and British Columbia.

[12] In the winter of 2022, Mr. Hagen and Mr. Sherman submitted a proposal to Mr. Bohner pursuant to which they, through a corporation, would become the operators of the golf course. On March 1, 2022, the parties entered into a Golf Course Lease Agreement pursuant to which Oxford Hills Golf would lease the golf course, including its equipment and buildings, for a term of five years. Generally, under this Lease Agreement, the Owner retained ownership of the golf course, while Oxford Hills Golf operated the course.

[13] The original term of the Lease Agreement was five years, with an automatic renewal right for a further five years so long as the Lessee was not in default, or unless the Lessee provided a notice of termination.

[14] Under the terms of the lease, Oxford Hills Golf was to pay rent in the amount of $20,000 plus HST per month to the Owner. Critically important, the Lease Agreement also contained a profit-sharing arrangement between the two parties. The Lease provided, in clause 5.3, as follows:

> 5.3 In addition to the Rent payable monthly, the Lessee shall also pay to the Lessor an annual profit sharing amount equal to Fifty-Percent (50%) of the Lessee's after tax net income from the operation of the Golf Course, payable on an annual basis within 30 days after the completion of the <u>Lessor's</u> financial statement and tax filings. The Lessor has the right to audit, acting reasonably, and at its sole cost and expense, the Lessee's annual financial statements and tax filings to confirm the annual profit amount payable in accordance with this Section 5.3. In addition, the Parties agree that any salaries payable to the Lessee's non arms-length employees require the approval of the Lessor, acting reasonably and taking into consideration the industry standard salary levels for comparable positions. Furthermore, the Lessee shall operate the Golf Course in a manner consistent with the industry, including incurring expenses that are required and commercially reasonable for the operation of a golf course of similar size and quality, the Lessee's financial statements and tax filings will be prepared in accordance with the applicable accounting standards and present fairly in all material aspects the revenues, earnings and results of operations of the Lessee for the applicable period. In the event the Lessor disputes the financial statements, the Parties will select a mutually-agreeable independent accounting firm to review the financial statements and the legitimacy of the expenses therein, at the Lessor's cost. In the event that the independent accounting firm determines that the Lessee has artificially decreased profits relating to its operation of the Golf Course in any manner whatsoever for the purpose of decreasing the payment due under section 5.3, it shall be considered a material breach of this Agreement and, in addition to any other remedies herein available to the Lessor related to the material breach, the Lessee shall reimburse the Lessor for the cost of the independent accounting firm referenced above. (emphasis added by me)

[15] I pause to note that it does strike me as odd that the payment in respect of profit-sharing would become due within 30 days of the <u>Lessor's</u> financial statement and tax filings. The Owner's fiscal year end was August 31st. Mr. Sherman deposed that this was an error and the parties intended that the due date would be based upon the Lessee's financial statement and tax filings. Mr. Bohner states that the Lease Agreement is correct. A term sheet that was prepared by counsel for Oxford Hills Golf also describes that the profit-sharing payment is due 30 days after the Lessor's filing. This is not an issue that can be determined on this motion and I decline to rectify the Lease Agreement in the face of this dispute.

[16] One of the issues raised relates to an application for a liquor license. Oxford Hills Golf was attempting to obtain a liquor license. An application was made to the Alcohol and Gaming Commission of Ontario in February of 2022. Oxford Hills Golf retained a consultant to assist them in this application. Apparently the liquor license was being held up because Mr. Bohner's company was building the spa as part of the restaurant, which created "zoning issues" with the municipality. In the meantime, Mr. Bohner asserts that Oxford Hills Golf has been illegally selling alcohol under the Owner's liquor license and that the failure to obtain a license permits him to terminate the lease.

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[17] The Lease Agreement provided, in clause 12.2, as follows:

> The Lessee shall comply with the requirements of all applicable federal, provincial and municipal statutes, laws, by-laws, rules, by-laws, regulations, ordinances and orders from time to time in force during the Term in regard to its occupancy and use of the Golf Course. Unless otherwise agreed to herein, the Lessee shall be responsible for obtaining all necessary Governmental Authority consents, licenses and permits, at its own cost and expenses, from time to time, for occupancy of the Golf Course Property and the Golf Course Buildings, and the use of the Golf Course Equipment, and the operation of the Golf Course.

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[18] A further issue that has arisen is with respect to "pre-paid golf memberships" that are sold towards the end of the golf season to be used for the following season. Oxford Hills Golf took over the 2022 season starting April 1, 2022. Prior to that date, the Owner had sold prepaid golf memberships in the amount of approximately $245,000. Those memberships were honoured for 2022. Oxford Hills Golf complains that the pre-paid golf memberships should be taken into account in favour of Oxford Hills Golf.

[19] However, clause 3.4 of the Lease states as follows:

> 3.4 Notwithstanding the Commencement Date, the Lessor agrees that the Lessee may start marketing and selling Golf Course memberships and related services on March 1, 2022, and the Lessee shall retain any revenues collected from that date forward for the purposes of operating and maintaining the Golf Course.

[20] At first blush, this clause would appear to permit the Owner to retain the monies from the prepaid golf memberships sold prior to March 1, 2022. However, I make no specific finding on that issue.

[21] The Lease Agreement requires the Lessee to maintain insurance in the names of the Lessee and the Lessor of not less than $5 million. Any failure to do so could be remedied by the Lessor, with the costs being payable by the Lessee.

[22] Oxford Hills Golf did have the requisite amount of insurance but did not ensure that the insurance was in the name of the Owner. The named insured on the police was "1000124505 Ontario Inc. a/o (*sic*) Mike Sherman a/o (*sic*) Adam Hagen o/a The Oxford Hills Golf Club.

[23] The Lease Agreement contained a clause dealing specifically with "Tenant Default". This included non-payment of any amount owing under the Lease Agreement on more than one occasion on the day or dates when due. This included failing to cure, or take steps satisfactory to the Lessor acting reasonably, to cure any failure to observe or perform any condition of the Lease Agreement within 10 business days after receipt of a notice in writing from the Lessor advising of the failure. This also included failing to repair, replace or otherwise correct any problem in the state or condition of the Golf Course to the satisfaction of the Lessor. Any act of default on the part of the Lessee would allow the

Lessor to terminate the Lease Agreement, re-enter the Property and expel the Lessee without the Lessor being liable.

[24] The Lease Agreement contained a Dispute Resolution Clause, requiring the parties to "utilize all reasonable efforts to resolve any dispute" in regard to their respective rights, obligations and duties arising out of or connected with this Agreement promptly and in a good faith manner by negotiation. Either party could request mediation within ten business days. If they could not agree on a mediator, either party could by notice in writing direct the matter to arbitration. The manner in which the arbitration was to be conducted is set out in clause 25.2. However, specifically, none of these dispute resolution clauses preclude either party from seeking interim relief from a court of competent jurisdiction. In short, the dispute resolution clause was not mandatory.

[25] Oxford Hills Golf operated the golf course for the 2022 golf season. According to Mr. Sherman, the golf course was successful.

[26] According to Mr. Sherman, in September of 2022, Mr. Bohner started demanding money and began to raise allegations of mismanagement on the part of Oxford Hills Golf. It is noteworthy, however, that this would coincide with the Owner's year end, such that it might also be reasonable to conclude that Mr. Bohner was anxious about receiving the profit-sharing payment that was soon to be due under the terms of the Lease Agreement, as written.

[27] According to Mr. Bohner, in October of 2022, Oxford Hills Golf terminated the Golf Professional that he had hired in 2021, Mr. Tyler Martindale. It was Mr. Bohner's view that Mr. Martindale was a good fit for the Golf Course and got along well with the members.

[28] In January of 2023, according to Mr. Bohner, he inquired of the liquor license consultant whether it was permissible for Oxford Hills Golf to be selling liquor under a license in the Owner's name. He says he was told that it was not. This revelation appears to have ignited ongoing discussions between the parties that led to the end of their relationship.

[29] In mid-February 2023, two notice letters were prepared by the solicitors for the owner, although it is not clear which of the two notice letters was actually delivered to Oxford Hills Golf.

[30] In a letter bearing the date February 15, 2023, and addressed to Mr. Sherman and Mr. Hagen, the Owner's solicitors set out seven alleged defaults and breaches of the Lease Agreement. The alleged acts and omissions included the failure to obtain the liquor license. The Owner also asserts that Oxford Hills Golf had not confirmed compliance with making all government remittances and had not kept proper accounting records of sales or costs and expenses. The Owner indicated that it reserved its right to terminate the Lease Agreement if these items were not cured within 10 business days after March 1, 2023.

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[31] In a letter dated February 21, 2023, the Owner's solicitors set out ten alleged defaults and breaches of the Lease Agreement. There was substantial overlap with the breaches described in the February 15, 2023 letter. Again, the Owner indicated that if the situation was not remedied by March 14, 2023, then the Lease Agreement would be terminated.

[32] Both notices requested the insurance policy to ensure that the Owner was listed as an insured.

[33] Following the delivery of these notices, the parties, through counsel, had some back and forth discussions. The Owner was attempting to obtain financial statements. Counsel for Oxford Hills Golf acknowledged that proper financial record keeping had not been done. Oxford Hills Golf indicated that it would produce financial statements before March 10, 2023 but then failed to do so. It then made "a firm commitment to provide the final financial statements and supporting documentation" by Friday, March 24, 2023.

[34] On March 23, 2023, unaudited draft financial statements were delivered to the Owner.

[35] By letter dated March 28, 2023, the Owner's solicitors wrote to Mr. Sherman and Mr. Hagen. The letter advises that Oxford Hills Golf had failed to provide adequate business records and accuses them of having no record keeping or financial control of the business. The letter sets out fourteen items that Oxford Hills Golf has failed to address, which obviously includes some new allegations that had not been raised in either of the two notices of default. In the letter, the Owner terminates the Lease Agreement.

[36] Mr. Bohner contacted Mr. Martindale, the golf professional, during the last week of March 2023 to hire him back to the club. Mr. Martindale indicated that he would not return if he was going to be working for Mr. Hagen, who he indicated was not an ethical person. Mr. Martindale advised Mr. Bohner that he believed that membership fees paid by members were being kept by Mr. Hagen or Mr. Sherman without being reported.

[37] Mr. Bohner investigated this allegation. He understood from Mr. Martindale that there were approximately 201 members of the club. However, the point of sale records did not show sufficient revenue to account for that many members. Mr. Bohner believed that something was amiss. He suspected that Mr. Hagen and Mr. Sherman had been accepting cash payments and not depositing the funds into the business. This, of course, would reduce the Owner's share under the profit-sharing arrangement.

[38] Mr. Bohner deposes that he discovered that there were 27 members who paid for their membership in cash. He spoke with those "cash members" who indicated that they had paid cash for their membership and received their membership at a discounted rate. Mr. Bohner alleges that Mr. Hagen and Mr. Sherman received cash payments totalling $35,460 which they personally kept. It is his position that these memberships ought to have generated over $70,000 had they not been discounted.

[39] According to Mr. Bohner, he confronted Mr. Hagen on April 11, 2023 with this allegation and Mr. Hagen admitted that he had sold discounted memberships and kept the cash

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received. He also indicated that he had split the cash received with Mr. Sherman. Mr. Bohner directed both Mr. Sherman and Mr. Hagen to pay the cash members their money back by text dated April 15, 2023.

[40] The text chain between Mr. Hagen and Mr. Bohner is adduced as an exhibit. Mr. Bohner does instruct Mr. Hagen to send them "your ½ back. At least it's done in good faith." Mr. Hagen responds "I am working on that as we speak" and then "my half will be paid this week for sure". Mr. Bohner asks if Mr. Sherman is also doing so and Mr. Hagen indicates that he has been unable to get hold of him. Mr. Bohner responds:

> "He best be quick about it. Because I'm stalling with all the cash people. They have not gone to cops yet as far as I know. They are planning to if it doesn't get resolved quickly."

[41] Mr. Hagen responds "I will make sure it is" and then "for my own personal well being".

[42] Whether or not this text chain corroborates Mr. Bohner's account, on his cross-examination, Mr. Hagen admitted that a number of memberships were paid for by cash. He also agreed that the Reconciliation of Revenue that was provided by Oxford Hills Golf's accountant on March 23, 2023, did not include any of the cash sales.

[43] Mr. Hagen also admitted that he and Mr. Sherman each kept a portion of the cash received from each cash member. The cash was never inputted into the point of sale system. Mr. Hagen suggested that he and Mr. Sherman each held on to portions of the cash "to use for our business in 2023". However, the money was not deposited into the company's bank account at any time until Mr. Bohner confronted the men about the cash. According to Mr. Hagen, they did not advise their accountant of this cash.

[44] Importantly, this evidence appears to specifically contradict the sworn affidavit evidence of Mr. Sherman when he states that "all prepaid memberships were reflected on the 2022 preliminary balance sheet as liability and would have been reflected on the 2023 income statement as revenue when reported".

[45] Mr. Sherman, on his cross-examination, confirmed that he and Mr. Hagen received cash payments for memberships and that the quantum of those payments was not provided to Oxford Hills Golf's accountant when he created the financial records provided to the Owner on March 23, 2023. Mr. Sherman would not agree that he and Mr. Hagen "split" the money but did agree that the money was "held by both of us". He says that they did so because the golf club did not have a safe. He says that they were going to account for the money "later". The money was not deposited into his company's bank account.

[46] I find Mr. Sherman's explanation during his cross-examination to be incredible and defy logic.

[47] In addition to retaining the cash from the cash memberships, Mr. Bohner makes several other allegations of self-dealing on the part of Mr. Hagen and Mr. Sherman. Mr. Bohner

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asserts that Mr. Sherman and Mr. Hagen were taking personal benefits that impacted the profit-sharing. For example, he claims that they were using the onsite gasoline tank which was to be used for the golf course's maintenance equipment, to fuel their personal use vehicles. This was admitted by Mr. Hagen on cross-examination, although he claims that he intended to deal with it in their final accounting.

[48] Mr. Bohner asserts that Mr. Hagen and Mr. Sherman have been paying non-arms' length salaries to family members that have not been approved by the Owner. Its clear from the cross-examinations that Mr. Hagen and Mr. Sherman did not obtain approval for the pay received by their family members. Notably, Mr. Sherman's wife did not log her hours into the payroll system used by the other employees, despite being paid based on the number of hours she worked. Her overall salary, however, was not exorbitant.

[49] Mr. Bohner states that after this motion was served he discovered video surveillance of Mr. Sherman and Mr. Hagen taking cash from the golf course restaurant, dividing it between themselves and placing the money into their pockets. According to Mr. Bohner, there were no cash sales recorded at the golf course restaurant for that date.

[50] On his cross-examination, Mr. Hagen admitted that both he and Mr. Sherman kept a portion of the cash as shown in the video surveillance. He testified that this cash was never placed in the bank account of Oxford Hills Golf.

[51] In his reply affidavit, Mr. Sherman indicates that he and Mr. Hagen "categorically and emphatically deny stealing from Mr. Bohner, his business, our business or any other business". However, he does explain that some members were offered discounts if they paid in cash for their memberships. It is Mr. Sherman's position that they were perfectly entitled to offer discounted memberships. He also states that he and Mr. Hagen are also perfectly entitled to hold cash for the business.

[52] In respect of the video showing the men taking cash from the golf course restaurant, Mr. Sherman deposes that all of the cash sales were properly recorded in the point of sale system and that it was the corporation's money and they were entitled to deal with it as they saw fit.

[53] At the time of the termination, Oxford Hills Golf states that the monthly rent was fully paid and up to date. Mr. Sherman deposes that Oxford Hills Golf was preparing for the 2023 golf season at the time that the lease was terminated. It is his position that Oxford Hills Golf's final financial statement was not due until June 2023 and that the cash would have been disclosed in the final document.

[54] Mr. Bohner indicates that Oxford Hills Golf has never provided detailed accounting records in relation to the business and has not made any profit-sharing payments to the Owner. It is his position that Mr. Sherman, as the Owner's previous general manager knew exactly when the Owner's fiscal year end was and knew that Mr. Bohner wanted the profit-sharing to be payable in relation to that date.

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[55] Following the purported termination of the Lease Agreement, the Owner forwarded notices to the members of the golf course indicating that Oxford Hills Golf was no longer going to operate the golf course and advising them to seek a refund from their credit card companies. Mr. Sherman states that these notices damaged the reputation of Oxford Hills Golf. He attaches a number of Reddit posts in which the members of the course express considerable dissatisfaction and frustration.

[56] Following the Owner's termination of the Lease Agreement, Mr. Bohner rehired Tyler Martindale as the club's new manager of golf operations. Mr. Martindale has indicated that he will not remain with the golf club if it is managed by Oxford Hills Golf (specifically Mr. Hagen and Mr. Sherman). Furthermore, the golf course superintendent also filed an affidavit in which he states that if Mr. Sherman and Mr. Hagen return to the golf course, he is not willing to stay on.

[57] Mr. Bohner's evidence is that after the March 28, 2023 termination letter, the parties were attempting to negotiate an end of their business relationship. Mr. Hagen confirmed this on his cross-examination.

[58] Oxford Hills Golf has issued a statement of claim seeking damages in the amount of $2 million plus punitive damages in the amount of $500,000. The evidence of Mr. Sherman on this motion is that the anticipated net profit was approximately $34,000 per year.

[59] This motion was served on May 16, 2023. It could not be heard until June 9, 2023.

Legal Arguments:

[60] The two parties approached this motion from different legal avenues.

[61] In its Notice of Motion, Oxford Hills Golf sought, among other orders, a declaration that the lease was in good standing and remains in full force and effect, an order granting vacant possession and quiet enjoyment of the premises and an interim injunction preventing the defendant from terminating the Lease. It also sought an order granting relief from forfeiture pursuant to the *Commercial Tenancies Act*.

[62] The Defendant focused its arguments on the test for an interim injunction, arguing that the Plaintiff failed to meet that test.

Legal Principles regarding Termination of a Commercial Lease:

[63] S. 19(2) of the *Commercial Tenancies Act* provides that a right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease, except for non-payment of rent, is not enforceable unless the lessor has served on the lessee a notice specifying the particular breach complained of and allowing the lessee to remedy the breach.

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[64] Oxford Hills Golf relies upon *Angling Outfitters v. 2047152 Ontario Limited*, 2013 ONSC 4953 (CanLII). Importantly, this was a decision following trial. There was both oral evidence and affidavit evidence before the court. At paragraph 14, Leach J. described that "the law generally is protective of a tenant's security of tenure, and a landlord must establish that the lease itself or extraordinary circumstances warrant dealing with a breach or default by way of lease termination and landlord re-entry rather than damages".

[65] At paragraph 17, Leach J. held that the tenant's identified conduct in that case was not of sufficient gravity to entitle the landlord to terminate the lease. He quoted the principle that "forfeiture of a lease is a serious event and that courts do not look favourably on forfeiture unless the tenant's behaviour has been persistent, substantial or reprehensible."

[66] With respect to s. 19(2) of the *Commercial Tenancies Act,* Leach J. noted that notice is a protection to the tenant, the purpose of which is to warn the tenant that its leasehold interest is at risk and to give the tenant an opportunity to preserve that interest by remedying the breaches underlying the landlord's complaints. The s. 19(2) notice requirement must be strictly complied with and, is a condition precedent to re-entry without action, and to the right to recover possession by action. Any purported re-entry and lease termination without prior satisfaction of the legislative notice requirement is invalid, such that the lease will remain in effect. A very little inaccuracy is fatal to the notice (see: *Angling Outfitters*, at paras. 23-25).

[67] In *2567267 Ontario Inc. v. Saverio Lucia Holdings Ltd*., 2023 ONSC 994, the issue was whether the tenant had entered into a sublease without the landlord's permission. The court found that it had not done so. However, the court also noted the importance of the landlord complying with s. 19(2) of the *Commercial Tenancies Act*.

[68] In *Clublink Corporation v. Pro-Hedge Funds Inc*., 2009 CanLII 32910 (ONSC), Strathy J. (as he then was) described that a tenant's conduct had to be of sufficient gravity to entitle the landlord to terminate the lease. The tenant's conduct must be persistent, substantial or reprehensible.

[69] Oxford Hills Golf argues that the notice provided is deficient. In its submissions, the record keeping allegations are not covenants under the Lease Agreement and the notice relies upon legislation that does not exist. Furthermore, in its submission, the specific breaches are uncertain, and it is not apparent how to remedy the breaches.

[70] Oxford Hills Golf also argues that if there was a breach, it is entitled to relief from forfeiture pursuant to s. 98 of the *Courts of Justice Act*. That section provides that "a court may grant relief from forfeiture against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just." S. 20 (1) of the *Commercial Tenancies Act* also grants the court the ability to provide relief from forfeiture of a lease.

[71] In *Martineau Holdings v. Caudle*, 2023 ONSC 358 (CanLII), Rasaiah J., at para. 40, described that the court should take into account all relevant circumstances in deciding whether to exercise its discretion to grant relief from forfeiture, including:

(a) Breaches of covenants other than the particular ones complained of;
(b) The history of the parties' relationship;
(c) The gravity of the breaches,
(d) The tenant's conduct or misconduct, and its good faith or bad faith.

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[72] Rasaiah J. noted that it is clear that forfeiture is a serious remedy that should be avoided. The ultimate question is whether the court should exercise its equitable jurisdiction to relieve from forfeiture imposed by the common law because it is an excessive remedy. She also noted that a party who seeks equitable relief must come before the court with "clean hands".

<u>*Legal Principles Regarding Injunctive Relief*</u>:

[73] Both parties agree that the test for interim, injunctive relief is set out in *RJR-Macdonald Inc. v. Canada*, (1994), 1994 CanLII 117 (SCC). The oft-cited test is as follows:

a. Is there a serious question to be tried?
b. Will the plaintiff suffer irreparable harm if the injunction is not granted? and;
c. Is the balance of convenience in the plaintiff's favour?

[74] In the commercial tenancy context, many cases have addressed the appropriateness of imposing injunctive relief to leave the tenant in possession of the premises.

[75] Where the result of a motion for an interlocutory injunction would likely amount to a final decision in the case, the courts have held that the party seeking injunctive relief must show that it has a strong *prima facie* case (see: *Jungle Lion Management Inc. v. London Life Insurance Company*, 2019 ONSC 780 (CanLII) at para.20). In *R. v. Canadian Broadcasting Corp*., 2018 SCC 5, the Supreme Court of Canada described the strong *prima facie* standard as follows, at para. 17:

> [17] …Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.

[76] Irreparable harm refers to the nature of the harm suffered, not its magnitude and is harm which cannot be quantified in monetary terms or which cannot be cured usually because one party cannot collect damages from the other (see: *Jungle Lion, supra*, at para 25).

[77] In *526901 B.C. Ltd. v. Dairy Queen Canada Inc*., 2018 BCSC 1092 (CanLII), it was noted that unquantifiable loss is not necessarily the same as loss that is difficult to assess. It is not unusual for courts to assess financial loss in a variety of commercial or breach of

contract cases. Specifically, it was noted in *526901 B.C. Ltd.*, that this includes situations where the aggrieved party has been put out of business (at para. 23).

[78] In *Duarte v. LensCrafters International Inc.*, 1994 CanLII 7427 (ON SC), a motion for an interlocutory injunction by a tenant was refused on the basis that a monetary judgment was available for the alleged breach of lease by the landlord. Thus, the tenant could not establish irreparable harm.

[79] The third part of the test requires the court to consider which party will suffer the greater harm from the granting or refusal of the of injunction pending determination of the merits.

[80] In *Jungle Lion Management*, it was noted that the loss of the tenant's business was an important factor both in terms of irreparable harm and the balance of convenience. In that case, the tenant had expended well over $3 million in relation to getting the restaurant ready to open. Accordingly, that case is readily distinguishable from the case before me on their facts.

[81] The Owner relies upon *First Choice Haircutters (Canada) Inc. v. Miller*, 1997 CarswellOnt 1661. In that case First Choice sought to evict the Millers from its premises. The Millers sought an injunction preventing the termination of the written agreement between the parties. The agreement between the parties provided that the Millers would pay a percentage of gross revenues towards royalty and advertising fees. Mr. Miller admitted that he was not reporting cash transactions because he wanted "a little bit of pocket money".

[82] The court held that the Millers, by reason of their actions, created a situation where the plaintiffs were entitled to serve a Notice to Terminate under the Agreement. The Court noted that equitable remedies were not available to the Millers because they did not come to court with clean hands.

Discussion and Analysis:

[83] It is my intention that my findings only apply to the motion before me. It may be that a trial judge, with the advantage of *viva voce* evidence, would come to a different conclusion. Furthermore, there are other relevant witnesses who did not provide any evidence on this motion. The results of this motion do not prevent the plaintiff proceeding with its action.

[84] In addition to the obligation of Oxford Hills Golf to pay to the Owner rent, this Lease Agreement also has a profit-sharing component to it. In my view that is a very important distinguishing feature of the commercial arrangement between these parties and is determinative of this motion.

[85] The profit-sharing arrangement is obviously dependent upon the golf course's revenue and expenses. The revenue and expenses would be primarily within the knowledge and control of Oxford Hills Golf. The Owner was entirely dependent upon Mr. Hagen and Mr. Sherman to accurately and fairly report the revenue and the expenses.

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[86] I am satisfied on the admissions made by Mr. Hagen and Mr. Sherman that they have failed to do so. Notwithstanding the protestations in Mr. Sherman's sworn affidavit, there are clear admissions that the men distributed the cash paid by the cash members between them. It is clear that these funds were not reported to Oxford Hills Golf's accountant prior to his preparation of the March 23, 2023 draft financial statements. By March 23, 2023, several months had passed from the time that the money had been pocketed by Mr. Hagen and Mr. Sherman. A reasonable inference to be drawn is that the men would never have reported these funds had they not been caught red-handed by Mr. Bohner.

[87] Similarly, there appear to have been further improprieties occurring as caught on video with respect to the money from the golf course restaurant. Again, neither of Mr. Hagen or Mr. Sherman plausibly denied taking and keeping that money.

[88] I disagree with Mr. Sherman's assertion that he and Mr. Hagen could do with this money as they pleased. To the contrary, they were in a profit-sharing arrangement under the Lease Agreement and by siphoning off revenue, they were directly impacting the profits reported by Oxford Hills Golf, to the detriment of the Owner. I do not accept that the men decided that since there was no safe on premises this was the proper way to handle the cash. It makes no sense that they would split the money in some fashion for safeguarding. It makes no sense that they would not immediately deposit the money into the bank if they intended to report it. I do not accept that they would have reported this cash to their accountant had Mr. Bohner not made the discoveries that he did. I do not accept that these cash transactions would have ever made it into the final financial statements.

[89] The Lease also specifically required that the remuneration of all non-arms length employees would be pre-approved by the Owner. The evidence is clear that this did not occur. While some or all of the salaries may have been entirely reasonable, or should have been approved had approval been sought, it is problematic that Mr. Sherman's wife was paid on an hourly basis but did not keep track of her hours on the system used by all of the other employees. This could be innocent but coupled with the concerns about Mr. Hagen and Mr. Sherman's handling of the cash, poor record keeping in relation to Mr. Sheman's wife's employment is problematic.

[90] Those issues are sufficient for me to deal with this motion. I therefore do not need to decide about issues such as insurance or the liquor license.

[91] Unlike cases such as *Jungle Lion Management*, or *Angling Fitters*, where the equities favoured the tenants, the equities on this motion do not favour Mr. Hagen or Mr. Sherman, or their company. There is a real odour of self-dealing here.

[92] On its face, the Lease Agreement required Oxford Hills Golf to pay the annual profit-sharing sum for the year within 30 days after the completion of the Owner's financial statement and tax filings. Oxford Hills Golf did not comply with that provision as they did not ever make any payments on account of profit-sharing. Although the Lease Agreement does not require Oxford Hills Golf to produce at any regular interval, or by any particular date, financial statements, its net profits could only be determined with proper record

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keeping. The evidence establishes clearly that there was not only poor record keeping, but that Mr. Hagen and Mr. Sherman impeded proper financial record keeping by removing cash from the operations and then failing to disclose that they had done so.

[93] I do consider that there are deficiencies with the notice provided by the Owner. First, it is not clear which of the two notices was actually provided to Oxford Hills Golf and the two notices are not the same. Secondly, I agree with counsel for Oxford Hills Golf that some, if not all, of the alleged deficiencies would not lead to termination of the Lease Agreement on the face of the Lease Agreement. Furthermore, some of the alleged deficiencies really only call for Oxford Hills Golf to confirm compliance with certain items, without any prior request for such information. It is certainly a triable issue whether these deficiencies invalidate the notice.

[94] On the other hand, the notices point out that the Lessee advised the Lessor that it had not kept proper accounting records of sales nor kept a proper set of books regarding expenses. Admittedly, it was not an express term of the Lease Agreement that the Lessee do so. However, in the absence of such records, it is unclear how the profit-sharing payment could ever be properly calculated or confirmed.

[95] Acknowledging the case law with respect to deficiencies in notices sent under s. 19 (2) of the *Commercial Tenancies Act*, I am still not prepared on this motion to resort that section and reinstate the lease. *Angling Outfitters* was a decision following a trial with a more robust record before the court. That allowed the court to make the necessary findings in favour of the tenant.

[96] Furthermore, the profit-sharing is a component of the rent due under this Lease. The notice provision contained in s. 19 (2) of the *Commercial Tenancies Act* does not apply in respect of the payment of rent. Accordingly, it is not clear that notice under s. 19 (2) was required to terminate the Lease Agreement in any event. However, neither party raised this argument during the hearing. I also note that the Lease's termination provision does allow for one missed payment of "rent".

[97] Critically, there are extraordinary circumstances that justify dealing with the alleged breaches by way of lease termination and landlord re-entry. The admitted conduct of Mr. Hagen and Mr. Sherman has been, in my view, reprehensible. The apparent misappropriation of cash was only discovered after the notices were delivered. In my view, the taking of cash and, more importantly, the non-disclosure of the taking of cash, should over-ride any deficiencies that might exist with the notice.

[98] In my view, Oxford Hills Golf was given sufficient notice that their leasehold interest was in jeopardy. This allowed Oxford Hills Golf to address any deficiencies. It also gave ample opportunity to Mr. Hagen and Mr. Sherman, had they wished to do so, to disclose the cash that they had each taken and kept. They both chose not to do so until confronted with Mr. Bohner's evidence.

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[99] Instead, as part of their response to that notice, Mr. Hagen and Mr. Sherman permitted their accountant to send a draft financial statement that was inaccurate and misleading because it failed to disclose the cash that they had taken out of the business. Importantly, Mr. Hagen and Mr. Sherman had to know that document was inaccurate because it did not include the cash that they had secreted.

[100] Given the admissions by Mr. Hagen and Mr. Sherman that they pocketed cash and did not report it until it was discovered by Mr. Bohner some months later, I would not exercise my discretion to grant relief from forfeiture on this motion under s. 20 of the *Commercial Tenancies Act* either.

[101] This case is very much like *First Choice Haircutters (Canada) Inc. v. Miller*.

[102] Mr. Hagen and Mr. Sherman cannot expect Mr. Bohner to continue under their Lease Agreement once he became aware that they had been skimming cash. Clearly, he cannot trust his "partners" in this golf course venture.

[103] An injunction is an equitable remedy that I find is not available to the plaintiff in this case. Oxford Hills Golf does not come to court with clean hands, and I will not condone their surreptitious pocketing of cash.

[104] In any event, the test for an interim injunction is not met here.

[105] I find that the moving party has not established a strong *prima facie* case. There are indicia of self-dealing as described that would, in my opinion, justify the termination of this lease.

[106] Furthermore, I find that should a trial judge find that the Owner has wrongfully terminated the Lease Agreement, the damages are easily quantifiable. Therefore, despite the loss of their business, Oxford Hills Golf has failed to establish irreparable harm.

[107] Finally, I find that the balance of convenience favours the Owner. By the time that this motion was commenced and argued, halfway through the 2023 golf season, the Owner had begun operating the golf course. He had hired Mr. Martindale as a new manager, who I am satisfied would not remain in that position should the lease be reinstated. Furthermore, the golf course superintendent has also expressed that he would depart. Although perhaps both of these men are replaceable, the detrimental impact of their departure to the golf course is still a factor to be considered in the balance of convenience. I also note that the Owner has taken steps to repair the relationships with the existing golf members. If the members were told about the acts of apparent dishonesty by Mr. Hagen and Mr. Sherman, would the members want to remain members? I suspect not.

[108] On the other hand, it does appear that Mr. Sherman and Mr. Hagen had taken steps to move on by the time that this motion was brought. If they are ultimately successful in this case, they can still recover damages. There is no suggestion that the Owner cannot pay damages. Furthermore, Mr. Hagen and Mr. Sherman have no one else to blame but themselves.

[109] Finally, I accept that Mr. Bohner has made a $16 million investment in this property. There can be no trust between him and Mr. Hagen and Mr. Sherman. This is not a case where I can simply return Mr. Hagen and Mr. Sherman to their previous position and the parties can carry on like nothing happened. The Lease Agreement in this case is not merely a lease. There is also an element of joint venture that requires mutual trust. That trust is irretrievably gone.

Disposition:

[110] For those reasons, the plaintiff's motion is dismissed.

[111] The defendant is entitled to its costs of this motion. If the parties cannot agree, the defendant may serve and file written submissions through the Woodstock trial coordinator by November 17, 2023, not to exceed two pages in length double spaced. The plaintiff's responding submissions, within the same parameters, are to be served and filed by November 24, 2023.

"Justice S. Nicholson"
Justice Spencer Nicholson

Date: October 26, 2023

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