CITATION: CanDeal Group Inc. v. Capservco Limited, 2024 ONSC 1315
COURT FILE NO.: CV-21-00673994-0000
DATE: 20240304

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
CANDEAL GROUP INC.	)	*Brendon Jones* for the Plaintiff
Plaintiff	)	
- and –	)	
CAPSERVCO LIMITED PARTNERSHIP, BY ITS GENERAL PARTNER CAPSERVCO INC. and CUSHMAN & WAKEFIELD ULC/CUSHMAN & WAKEFIELD SRI	)	*Michael Beeforth* and *Rabita Sharfuddin* for the Defendant Capservco Limited Partnership by its general partner Capservco Inc.
Defendants	)	*Gavin J. Tighe* and *Kevin Mooibroek* for the Defendant Cushman & Wakefield ULC/Cushman & Wakefield SRI
	)	**HEARD**: February 13, 2024

PERELL, J.

REASONS FOR DECISION

caveat emptor, qui ignorare non debuit quod jus alienum emit

A. Introduction

[1] The Defendant, Capservco Inc., is the general partner of the Defendant, Capservco Limited, which is the management or corporate side of Grant Thornton LLP, the audit, accountancy, and consulting firm that has offices across Canada (collectively, "Grant Thornton").

[2] In the summer of 2019, the Defendant Cushman & Wakefield ULC/Cushman & Wakefield SRI ("Cushman & Wakefield"), which is a real estate brokerage firm, was retained by Grant Thornton to sublease its national office at 50 Bay Street, Toronto, Ontario. The building at 50 Bay Street is a 15-storey commercial office tower across the street from Union Station, the very busy train station and commuter transportation hub in downtown Toronto.

[3] In the fall of 2019, Grant Thornton's premises came to the attention of Lennard Commercial Realty, another real estate brokerage firm, which was assisting the Plaintiff CanDeal Group Inc., which is a financial services company, in acquiring new office premises in downtown

Toronto.

[4] After numerous visits to 50 Bay Street, in early 2020, CanDeal signed an agreement to sublease Grant Thornton's premises. CanDeal took possession of the premises and made over a million dollars of tenant fixtures and improvements. In the fall of 2020, CanDeal's employees began working at 50 Bay Street.

[5] Over a year later, on December 17, 2021, CanDeal sued Grant Thornton seeking, among other things, a declaration that Grant Thornton's premises were subject to a latent defect in respect of train noise from trains idling at Union Station. CanDeal sought an order declaring the sublease void by reason of Grant Thornton's concealment and misrepresentation of the noise of idling trains.

[6] The litigation moved slowly and two years later in 2023, CanDeal added Cushman & Wakefield as a defendant to its lawsuit against Grant Thornton. CanDeal alleged that Cushman & Wakefield was liable for negligence and misrepresentation. CanDeal alleged that Cushman & Wakefield and Grant Thornton had conspired to prevent CanDeal from discovering the idling train noise emanating from Union Station.

[7] In the two motions now before the court, Grant Thornton and Cushman & Wakefield seek summary judgments dismissing CanDeal's action.

[8] For the reasons that follow the two summary judgment motions are granted and CanDeal's action is dismissed. Briefly by way of overview, there was no defect, no latency, no misrepresentation, no concealment, no conspiracy, and, in any event: (a) CanDeal acknowledged that the premises were proximate to transportation facilities including rail lines; (b) CanDeal acknowledged that it had inspected the premises; and (c) both the head lease and in the sublease, CanDeal contracted that Grant Thornton shall **not** be liable for any disturbance to CanDeal's business operations caused or contributed to by noise or vibrations from the operation of any transportation system.

[9] The Defendants are not liable. Had Grant Thornton been liable, it had a disclaimer clause exculpating it from liability.

B. ***Caveat Emptor***

[10] CanDeal's causes of action against Grant Thornton and Cushman & Wakefield are about *caveat emptor* ("let the buyer beware") and the exceptions to *caveat emptor*. The complete Latin phrase is *caveat emptor, qui ignorare non debuit quod jus alienum emit*, which means: "Let the purchaser, who is not to be ignorant of the amount and nature of the interest, exercise proper caution."

[11] *Caveat Emptor* is a complex legal concept that simultaneously involves contract law, tort law, and real property law.[1] The principle of *caveat emptor* concerns the law's treatment of what

[1] J.M. McCamus, "*Caveat Emptor*: The Position at Common Law", [2002] L.S.U.C. Special Lectures 92; H. Herskowitz, "The Death of *Caveat Emptor*: Mandatory Warranties and Disclosure in New Home Transactions", [2002] L.S.U.C. Special Lectures 143; B.N. McLellan, "Drafting Purchase Agreements to Qualify or Extend *Caveat Emptor*" [2002] L.S.U.C. Special Lectures 97; D.J. Manderscheid, "*Caveat Emptor* and the Sale of Land: The Erosion of a Doctrine" (2001), 39 Alta. L. Rev. 441; B. Laskin, "Defects of Title and Quality", [1960] L.S.U.C. Special Lectures 389.

the vendor is or is not obliged to say or disclose about property being sold.

[12] *Caveat emptor*, "let the buyer beware," is a statement of legal policy. The law tells a purchaser to protect himself or herself by the law of contract, that is, by bargaining for protections, or by a careful inspection of the property being purchased. The policy of *caveat emptor* warns the purchaser that his or her rights to complain about a property with physical defects do not automatically exist and if they do exist, they may be reduced by the closing of the transaction and by contract terms that exclude liability for representations including representations by silence.

[13] The general rule of *caveat emptor* is that the vendor of real property does not have to disclose physical defects about his or her property. The leading Canadian case about *caveat emptor* is the Supreme Court of Canada's decision in *Fraser-Reid v. Droumtsekas*.[2] In that case, Justice Dickson, as he then was, stated:

> Although the common law doctrine of *caveat emptor* has long ceased to play any significant part in the sale of goods, it has lost little of its pristine force in the sale of land. […] The rationale stems from the *laissez-faire* attitudes of the 18th and 19th centuries and the notion that a purchaser must fend for himself, seeking protection by express warranty or by an independent examination of the premises. If he fails to do either, he is without remedy either at law or in equity, in the absence of fraud or fundamental difference between that which was bargained for and that obtained.

[14] What this passage means is that subject to a few exceptional circumstances where the law will aid a purchaser in a sale of land transaction, if the purchaser wants to protect himself or herself from being disappointed about the physical quality of the property being purchased, then the purchaser must inspect the property before signing the agreement and be satisfied about the property. Alternatively, the purchaser should negotiate for protective terms in the agreement of purchase and sale that will survive the closing of the transaction.

[15] *Caveat emptor* means that absent fraud, breach of contract, or misrepresentation, the vendor will not be liable for failing to disclose latent defects he or she knew about or ought to have known about, unless they render the property unsafe or unfit for human habitation. *Caveat emptor is* alive and well in Ontario modern real property jurisprudence.[3]

[16] The law associated with *caveat emptor* draws a distinction between patent defects and latent defects about the physical quality of the real property. *Caveat emptor* applies to patent defects, which are faults in the physical quality of real property that are perceivable by inspection and ordinary due diligence by the purchaser.[4] Conversely, a latent defect is a fault in the physical

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[2] [1980] 1 S.C.R. 720.

[3] *Bolduc v. Legault*, 2023 ONSC 1192; *Gebre-Hiwet v. McPherson*, 2022 ONSC 1421; *Vieira v. Dawson*, 2018 ONSC 413; *Molerovic v. Pye*, 2017 ONSC 4251 (Div. Ct.); *Ricchio v. Rota*, 2011 ONSC 6192; *Guglielmi v. Russo*, 2010 ONSC 833 (Div. Ct.); *Riley v. Langfield*, [2008] O.J. No. 2028 (S.C.J.); *Trihar Holdings Ltd. v. Lambton*, [2007] O.J. No. 5528 (S.C.J.); *Morrill v. Bourgeois*, [2007] O.J. No. 1851 (S.C.J.); *400 Wentworth Inc. v. Waterjet Machining Inc.*, [2007] O.J. No. 805 (S.C.J.); *Bertrand v. Trites*, [2006] O.J. No. 4510 (S.C.J.); *Carreau v. Turpie*, [2006] O.J. No. 4224 (S.C.J.); *Antorisa Investments Ltd. v. 172965 Canada Ltd.*, [2006] O.J. No. 3427 (S.C.J.); *Beaudoin v. Lauzon*, [2006] O.J. No. 2598 (S.C.J.); *Whaley v Dennis*, [2005] O.J. No. 3174 (S.C.J.); *Holtby's Design Service v. Campbell Chevrolet Oldsmobile*, [2002] O.J. No. 2889 (S.C.J.), aff'd [2004] No.183 (C.A.); *Tony's Broadloom and Floor Covering Ltd. v. NCM Canada Ltd* (1997), 31 O.R. (3d) 481 (C.A.), aff'g. (1995), 22 O.R. (3d) 244 (Gen. Div.); *McGrath v. MacLean* (1979), 22 O.R. (2d) 784 (C.A.).

[4] *Gebre-Hiwet v. McPherson*, 2022 ONSC 1421; *Krawchuk v. Scherbak*, 2011 ONCA 352, leave to appeal to the SCC ref'd [2011] S.C.C.A. No. 319; *Holtby's Design Service v. Campbell Chevrolet Oldsmobile*, [2002] O.J. No. 2889 (S.C.J.), aff'd [2004] No.183 (C.A.); *Tony's Broadloom and Floor Covering Ltd. v. NCM Canada Ltd* (1997),

quality of the real property that is not perceivable to an ordinary purchaser during a routine inspection.[5] The distinction between patent defects and latent defects is that there are exceptions to *caveat emptor* for some circumstances of latent defects.

[17] It should be noted that there are also patent and latent defects about the title, i.e., the ownership of real property (a metaphysical concept), but that is a different matter which for present purposes is not relevant to the discussion. The case at bar does not involve title defects. The case at bar involves an alleged physical defect in 50 Bay Street associated with the sounds of idling trains disturbing the quiet enjoyment of those premises.

[18] There are exceptions to *caveat emptor*. CanDeal relies on the exceptions to make its case against Grant Thornton and against Cushman & Wakefield.

[19] Fraudulent misrepresentation and negligent misrepresentation provide an exception to *caveat emptor*.[6] There is an exception to *caveat emptor* for latent defects that the vendor knows about or is wilfully blind about and that the vendor intentionally (actively) covers up or conceals from being discovered.[7] Even without active concealment, there is an exception to *caveat emptor* where the vendor knows and fails to disclose a latent defect that makes the premises dangerous or unfit for occupation.[8]

[20] Contractual terms and representations provide an exception to *caveat emptor*.[9] There is an exception to *caveat emptor* for an error *in substantialibus*.[10] An error *in substantialibus* occurs when there is a fundamental difference between that which was bargained for and that obtained so that there is a virtual failure of consideration.

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31 O.R. (3d) 481 (C.A.), aff'g. (1995), 22 O.R. (3d) 244 (Gen. Div.); *Ontario Ltd. v. Piron*, [1994] O.J. No. 2844 (Gen. Div.), aff'd [1999] O.J. No. 1720 (C.A.); *McCallum v. Dean*, [1956] O.J. No. 345 (C.A.).

[5] *Gebre-Hiwet v. McPherson*, 2022 ONSC 1421; *Molerovic v. Pye*, 2017 ONSC 4251 (Div. Ct.); *Krawchuk v. Scherbak*, 2011 ONCA 352, leave to appeal to the SCC ref'd [2011] S.C.C.A. No. 319; *Ricchio v. Rota*, 2011 ONSC 6192; *Guglielmi v. Russo*, 2010 ONSC 833 (Div. Ct.); *Carreau v. Turpie*, [2006] O.J. No. 4224 (S.C.J.); *Whaley v. Dennis*, [2005] O.J. No 3174 (S.C.J.); *Swayze v. Robertson*, [2001] O.J. No. 968 (S.C.J.); *Tony's Broadloom and Floor Covering Ltd. v. NCM Canada Ltd* (1997), 31 O.R. (3d) 481 (C.A.), aff'g. (1995), 22 O.R. (3d) 244 (Gen. Div.).

[6] *Soboczynski v. Beauchamp*, 2013 ONSC 2631 (Div. Ct.); *Nylander v. Martin*, 2012 ONSC 6281; *Costa v. Wimalasekera*, 2012 ONSC 6056 (Div. Ct.); *Krawchuk v. Scherbak*, 2011 ONCA 352, leave to appeal to the SCC ref'd [2011] S.C.C.A. No. 319; *Riley v. Langfield*, [2008] O.J. No. 2028 (S.C.J.); *Tregunna v. Gauld*, [2007] O.J. No. 67 (S.C.J.); *Whaley v. Dennis*, [2005] O.J. No. 3174 (S.C.J.); *Swayze v. Robertson*, [2001] O.J. No. 968 (S.C.J.); *Peek v. Gurney* (1873), L.R. 6 (H.L.).

[7] *Gebre-Hiwet v. McPherson*, 2022 ONSC 1421; *Cotton v. Monahan*, 2011 ONCA 697*; Guglielmi v. Russo*, 2010 ONSC 833 (Div. Ct.); *Riley v. Langfield*, [2008] O.J. No. 2028 (S.C.J.); *688530 Ontario Ltd. v. Piron*, [1994] O.J. No. 2844 (Gen. Div.), aff'd [1999] O.J. No. 1720 (C.A.); *Gumbmann v. Cornwall*, [1986] O.J. No. 1418 (H.C.J.) *Abel v. McDonald* (1964), 45 D.L.R. (2d) 198 (Ont. C.A.).

[8] *Vieira v. Dawson*, 2018 ONSC 413; *Nixon v. MacIver*, 2014 BCSC 533 (B.C.S.C.); *Cotton v. Monahan*, 2010 ONSC 1644; *Guglielmi v. Russo*, 2010 ONSC 833 (Div. Ct.); *Lunney v. Kuntova*, [2009] O.J. No. 742 (S.C.J.); *Swayze v. Robertson*, [2001] O.J. No. 968 (S.C.J.); *Cardwell v. Perthen*, 2007 BCCA 313 (B.C.C.A.), aff'g. 2006 BCSC 333 (B.C.S.C.); *McQueen v. Kelly*, [1999] O.J. No. 2481 (S.C.J.); *McGrath v. MacLean* (1979), 22 O.R. (2d) 784 (C.A.).

[9] *Gardiner v. Mulder*, [2007] O.J. No. 870 (S.C.J.); *Fournier v. Schinnour* [2003] A.J. No. 320 (Q.B.); *Capperauld v. Ledoux*, [1992] O.J. No. 1738 (Gen. Div.); *Manica v. Vranic*, [1989] O.J. No. 144 (Dist. Ct.); *Chapman v. HLS York Development Ltd.*, (1988), 64 O.R. (2d) 498 **(**H.C.J.); *Lichtenberg v. Johnstone*, (1986) 55 O.R. (2d) 663 (Div. Ct.); *De Michele v. Peterkin*, [1985] O.J. No. 542 (H.C.J.).

[10] *Fraser-Reid v. Droumtsekas*, [1980] 1 S.C.R. 720; *Redican v. Nesbitt*, [1924] S.C.R. 135.

[21] *Tony's Broadloom and Floor Covering Ltd. v. NCM Canada Ltd.*[11] illustrates *caveat emptor* and the differences between patent and latent defects of the physical quality of the real property. In this case, the vendor owned a factory property that was contaminated by Varsol and oils that had been dumped in the backyard for many years. A clean-up effort was underway. Although the purchaser planned to build a condominium project on the property, it signed an agreement to buy the property as an industrially zoned property. It did not tell the vendor about its plans to redevelop the property as a condominium, and the vendor did not tell the purchaser about the contamination. The vendor did not hide the contamination. It simply remained silent. Had the purchaser inspected the property before the closing, the contamination would have been apparent. It was a patent defect about the quality of the land. After the closing, the purchaser discovered the contamination, but it continued to try and redevelop the property. When it abandoned these efforts some four years later, it then sued for rescission. The action was dismissed on a motion for summary judgment, and the judgment was upheld by the Ontario Court of Appeal.

[22] Justice Doherty wrote the judgment for the court, and the reasons for dismissing the purchaser's claim. The purchaser had contracted to purchase an industrial property, and that is what it received. The provision in the agreement that the present use could lawfully be continued was not breached, and the other provisions in the agreement including the several entire agreement provisions favoured the vendor. The purchaser did not protect itself by any conditions precedent or promises that the property could be redeveloped for condominiums and there was no absolute prohibition preventing the property from being used as a factory.

[23] The contamination was a patent physical defect because it was apparent upon any reasonable inspection by the purchaser. The defect in *Tony's Broadloom* was a patent defect of quality for which the purchaser had not contracted any protection nor adequately inspected.

[24] *McGrath v. MacLean*,[12] is another important case about *caveat emptor*. In this case, Justice Dubin, as he then was, quoted from then Professor, as he then was, Bora Laskin's lecture on the vendor's duty of disclosure in a real estate transaction. Professor Laskin stated:[13]

> "... a latent defect of quality going to fitness for habitation and which is either unknown to the vendor or such as not to make him chargeable with concealment or reckless disregard of its truth or falsity will not support any claim of redress by the purchaser. He must find his protection in warranty."

[25] In *McGrath v. MacLean*, Justice Dubin then stated:

> I am prepared to assume that, in an appropriate case, a vendor may be liable to a purchaser with respect to premises which are not new if he knows of a latent defect which renders the premises unfit for habitation. But, as is pointed out in the lecture referred to, in such a case it is incumbent upon the purchaser to establish that the latent defect was known to the vendor, or that the circumstances were such that it could be said that the vendor was guilty of concealment or a reckless disregard of the truth or falsity of any representations made by him.

[11] (1997), 31 O.R. (3d) 481 (C.A.), aff'g. (1995), 22 O.R. (3d) 244 (Gen. Div.).
[12] (1979), 22 O.R. (2d) 784 (C.A.).
[13] Laskin, B., "Defects of Title and Quality", *[1960] L.S.U.C. Special Lectures 389*. Another famous quote from this lecture is: "Absent fraud, mistake, or misrepresentation, a purchaser takes existing property as he finds it, whether it be dilapidated, bug-infested or otherwise inhabitable or deficient in expected amenities, unless he protects himself by contract terms."

> Similarly, I am prepared to assume that there is a duty on the vendor to disclose a latent defect which renders the premises dangerous in themselves, or that the circumstances are such as to disclose the likelihood of such danger, e.g., the premises being sold subject to radioactivity.

[26] The general principle from the *McGrath* case is that the vendor is not responsible to the purchaser for a defect be it patent or latent unless he or she conceals that defect, or he or she knows of a latent defect that renders the premises unfit for habitation or dangerous.[14]

C. *Dramatis Personae*

[27] **CanDeal Group Inc.** is a financial services company. It offers a fixed income and derivatives trading platform and various related data and analytics products. At the relevant time, **Jayson Horner** was the Chief Executive Officer (CEO), **Robert Kowalik** was the Chief Financial Officer (CFO), and **Debbie Milner** is and was the Office Manager of CanDeal.

[28] In these proceedings, Ms. Milner swore two affidavits and was cross-examined. There was no evidence from Mr. Horner and Mr. Kowalik.

[29] **Ryan Lyons** of Lennard Commercial Realty was CanDeal's real estate agent. He visited Grant Thornton's premises at 50 Bay Street. with CanDeal's representatives and employees. In these proceedings, there was no evidence from Mr. Lyons.

[30] **Capservco Inc**. is the general partner of **Capservco Limited Partnership**, which is the management or corporate side of Grant Thornton LLP, the audit, accountancy, and consulting firm that has offices across Canada (collectively, "**Grant Thornton**"). At the relevant time, **Kevin Ladner** was the CEO of Grant Thornton, **Michelle Wettlaufer** was the CFO, and **Deborah Hatton** worked as a receptionist, administrative assistant at 50 Bay Street. **Wendy MacDonald** is a former Grant Thornton, Director of Operations. She was a partner from 2010 to her retirement in 2019. She did not work at 50 Bay Street. Her own office was at Grant Thornton's Toronto Office at 200 King Street West.

[31] Ms. Wettlaufer swore two affidavits. She was cross-examined. She was also examined for discovery as Grant Thornton's representative. Ms. Hatton and Ms. MacDonald were summoned as witnesses by CanDeal pursuant to Rule 39.03. There was no evidence from Mr. Ladner.

[32] **Cushman & Wakefield ULC/Cushman & Wakefield SRI** ("Cushman & Wakefield") is a real estate brokerage and real estate services firm. At the relevant time, **Cameron Mitchell** was a Vice President of Cushman & Wakefield. He was the head real estate broker retained by Grant Thornton to sublease Grant Thornton's premises at 50 Bay Street, Toronto. **George Tedder** is the Chief Executive Officer (CEO) and **Katya Shabanova** is the Chief Financial Officer (CFO).

[33] Mr. Mitchell swore an affidavit and was cross-examined. There was no evidence from Mr. Tedder or from Ms. Shabanova.

[34] **Chantal Laroche** is a professor at the University of Ottawa in the Audiology and SLP Program of Rehabilitation Sciences, Faculty of Health Science. She was retained by CanDeal to prepare an analysis of the impact of the train noise from Union Station on the concentration and performance of CanDeal's employees at Suites 1200 and 1430 at 50 Bay Street, Toronto. Professor

[14] *Cotton v. Monahan*, 2010 ONSC 1644; *Swayze v. Robertson*, [2001] O.J. 968 (S.C.J.); *Guglielmi v. Russo*, 2010 ONSC 833 (Div. Ct.); *Lunney v. Kuntova*, [2009] O.J. No. 742 (S.C.J.); *McQueen v. Kelly*, [1999] O.J. No. 2481 (S.C.J.).

Laroche prepared a report. She was not cross-examined.

[35] **Todd Busch** is a Senior Acoustical Consultant formerly at Soft dB, an engineering firm specializing in acoustical measurements and analysis. He was asked by CanDeal to prepare a Noise Impact Assessment of the impact of the noise of idling trains at Suites 1200 and 1430 at 50 Bay Street, Toronto. He prepared two reports. Mr. Busch was cross-examined.

[36] **Mark Levkoe** is the Principal Engineer of Valacoustics Canada Ltd., which was retained to review the reports of Soft dB and the report of Professor Laroche. Mr. Levkoe was cross-examined.

[37] **Josie Sabino** is a law clerk at Dentons Canada LLP, lawyers for Grant Thornton. She was not cross-examined.

D. Facts

1. Train Noise at Suites 1200 and 1404, 50 Bay Street, Toronto, Ontario

[38] Beginning in 2013, Grant Thornton LLP carried on an accountancy, auditing, and consulting service business in suites 1200 and 1404, 50 Bay Street, Toronto, Ontario. These premises were Grant Thornton's national office. It also has a Toronto office.

[39] 50 Bay Street is a fifteen-storey office tower located adjacent to Union Station, the busiest railway station in Canada servicing commuters and travellers. Union Station services GO Transit, VIA Rail, the UP Express, the TTC subway, and TTC light rail. It is also a bus terminal. According to the Union Station website, over 300,000 people commute through Union Station every day.

[40] Below is an aerial photograph of Union Station, 50 Bay Street, and Scotiabank Arena, which has the Bank of Nova Scotia's logo on its roof. In the photograph, Union Station is north of 50 Bay Street, and 50 Bay Street is to the north of and is connected to Scotiabank Arena.

[41] There is no dispute between the parties that train noise could be heard by Grant Thornton's employees who were the occupants of suites 1200 and 1404 at 50 Bay Street.

[42] CanDeal's case against Grant Thornton and Cushman & Wakefield is premised on differentiating the noise from trains moving into and out of Union Station from the noise of trains idling before they move in or out of the station.

[43] I am persuaded by the evidence from the witnesses, including the expert witnesses, that the

noise from idling trains intensifies the train noise perceived at Grant Thornton's premises by between 4 to 7 decibels ("db").

[44] I am persuaded that the perceived idling train noise was greater on the east side of the premises and greatest around the north-east area. The idling train noise increases when there is more than one train idling.

[45] The noise from idling trains occurs at irregular times and for irregular intervals. There is no specific pattern. There are, however, a greater number of trains in the station during the mornings when the volume of trains arriving and departing is at its highest.

[46] Ms. Wettlaufer, Grant Thornton's CFO testified that train noise was perceived at Grant Thornton's premises, but that that the noise did not interfere with the use and enjoyment of the premises. She said there were no employee complaints and there was no interference with the cognitive abilities of the employees because of the noise from the railway station. I believe this evidence to be true.

[47] Ms. Hatton, Grant Thornton's receptionist at 50 Bay Street, testified that train noise was not a problem for Grant Thornton's employees. She personally noted the train noise, but she was not bothered by it. I believe this evidence to be true.

[48] In 2021, after CanDeal had occupied the premises at 50 Bay Street for about a year, it retained Soft dB, an engineering firm, to prepare a report about train noise. The report was based on the configuration of the premises after CanDeal's extensive tenant improvements. Over the course of a week, Soft dB's engineers took sound level measurements in one-minute intervals. They prepared a Noise Impact Assessment of Idling Trains report dated August 16th, 2021, and for this litigation they prepared a report dated December 6th, 2023.

[49] Mr. Busch, of Soft dB, measured the noise levels and concluded that the interior noise levels at the premises from idling trains at Union Station were 50 dBA. He said that this noise would be heard while a train idles, which would last for periods between 5 minutes to 30 minutes. He said that a noise level of 50 dBA exceeded the 35 dBA target under the ASHRAE Guidelines for what is an acceptable sound level for commercial office space. The ASHRAE guidelines are used as a measure of acceptable continuous background levels from HVAC systems and mechanical equipment. He observed that the perception of low-frequency sounds is different from high-frequency sounds such that the measurements may underestimate the subjective increase in loudness for tonal low frequency sounds.

[50] In this litigation, Grant Thornton retained Mr. Levkoe to critique Soft dB's report and to do an acoustic investigation of his own. Mr. Levkoe measured the noise levels in CanDeal's reconfigured premises using Ministry of Environment, Conservation and Parks ("MECP") methodologies designed to assess external intermittent noises sources. He took measurements over a 16-hour period. Mr. Levkoe concluded that the noise levels created by idling trains in the subleased premises ranged from 42-45 dBA. Relying on MECP's NPC-300, a standard designed to assess external, intermittent noise sources such as trains and roads, Mr. Levkoe opined that this was an acceptable level for open-space offices.

[51] Mr. Levkoe criticized Mr. Busch's measurements for not subtracting for internal noise. Mr. Levkoe criticized Mr. Busch's opinion for not using the ASHRAE guidelines for open-plan offices, which specify that a noise level of 40-50 dBA is acceptable for open-space offices.

[52] I find as a fact that from time to time the noise level from idling trains may have exceeded

50 decibels - during CanDeal's occupation of the premises - but this would have been a rare and unpredictable occurrence dependent upon more than one train idling. I find as a fact that - during CanDeal's occupation of the premises - the noise levels created by idling trains in the premises typically ranged between 42-45 decibels.

[53] I find as a fact that the noise level from idling trains was less than 50 decibels during Grant Thornton's occupancy of the premises because Grant Thornton had configured the space differently. I find as a fact that during Grant Thornton's occupancy of the premises, the noise levels were at acceptable levels.

[54] During Grant Thornton's occupancy of the premises, while the noise from trains, including the noise from idling trains, was perceivable, the noise was tolerable and the noise did not interfere with the work environment of Grant Thornton's employees. I find as a fact that the sound proofing in the premises was not defective during Grant Thornton's occupancy of the premises.

2. The Subleasing of Suites 1200 and 1404, 50 Bay Street, Toronto, Ontario

[55] In 2013, pursuant to a lease dated **February 1, 2013** ("the Head Lease"), 3642968 Canada Inc. leased suites 1200 (17,362 sq. ft.) and 1404 (1,260 sq. ft.) in a 15-storey office tower at 50 Bay Street in downtown Toronto to Grant Thornton.

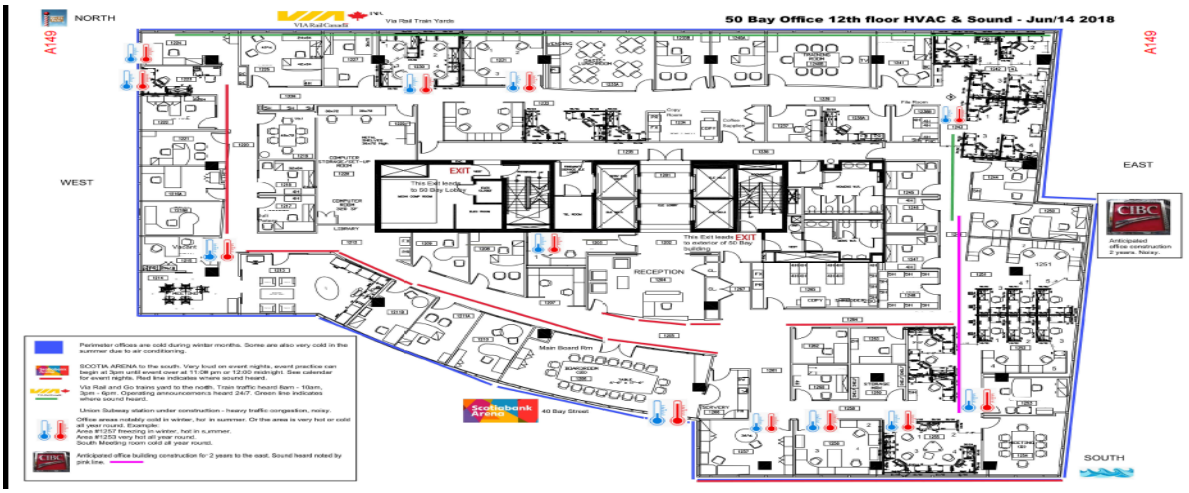
[56] For present purposes, the following provisions of the Head Lease are pertinent:

> *Consent Required*
>
> 14.1 (a)(ii) Subject to subsection 14.1(c) below, Tenant shall not sublet or part with or share possession of all or any part of the [Property], without the prior written consent of Landlord in each instance, which consent, subject to the provisions of Section 14.3 below, may not be unreasonably withheld.
>
> […]
>
> *Terms of [Sublease]*
>
> 14.4(b) In the event of any [Sublease], Landlord shall have the following rights: to require Tenant and [Subtenant] to enter into an agreement ("Assumption Agreement") with Landlord in writing whereby the parties agree, jointly and severally, to be bound by all of Tenant's obligations under [the Head Lease].
>
> […]
>
> *Effect of Transfer*
>
> 14.5 (e) Every [Subtenant] shall be obliged to comply with all of the obligations of Tenant under this Lease. Tenant shall enforce all of such obligations against each [Subtenant]
>
> *Noise and Vibration*
>
> 17.8 Tenant acknowledges that the [Property] is or may be situated at or near rail lines or other transportation facilities and Tenant agrees that neither Landlord nor any transportation supplier shall be liable or responsible in any way for any disturbance to Tenant's business operations caused or contributed to by noise or vibrations in, on or around the [Property] resulting from the operation of any transportation system whatsoever.

[57] In **September 2017**, Grant Thornton extended the term of the Head Lease for an additional

ten years extending the lease to 2029.

[58] In **2018**, Grant Thornton considered renovating its premises at 50 Bay Street. Ms. Hatton drafted a possible floor plan dated June 14, 2018. The Floor Plan is depicted below.



[59] The legend in the bottom left corner of the floor plan reads as follows:

- Perimeter offices are cold during winter months. […]
- SCOTIA ARENA to the south. Very loud on event nights, event practice can begin at 3 p.m. until event over at 11:00 p.m. or 12:00 midnight. See calendar for event nights. Red line indicates where sound heard.
- Via rail and Go trains yard to the north. Train traffic heard 8 a.m. – 10 a.m. 3 p.m. – 6 p.m. Operating announcements heard 24/7. Green line indicates where sound heard.
- Union Subway station under construction – heavy traffic congestion, noisy.
- Office areas notably cold in winter, hot in summer. […]
- Anticipated office building [CIBC] for 2 years to the east. Sound heard noted by pink line.

[60] Ms. Hatton said that she annotated the Floor Plan to note "idiosyncrasies" in noise and temperature levels that could be addressed if the premises were renovated.

[61] In anticipation of possibly renovating the premises, Grant Thornton surveyed its employees using a questionnaire. Elsie Karulas, one of the employees responded that "soundproofing is required." Paul Ellsworth, another employee responded that the noise in the area for the "L & D" (Leadership and Development) group and in lunchroom was loud. There is no mention of train noise in the questionnaire responses.

[62] In early **2019**, Grant Thornton decided that it had outgrown the space at 50 Bay Street, and it decided to relocate to larger premises and to sublease suites 1200 and 1404 at 50 Bay Street. Grant Thornton retained Cushman & Wakefield to find a subtenant. Cameron Mitchell was the lead broker. Two other brokers, George Tedder and Katya Shabanova, were involved in marketing the premises.

[63] Ms. MacDonald of Grant Thornton provided Cushman & Wakefield with a copy of the June 14, 2018 floor plan. Ms. Hatton discussed the floor plan with Cushman & Wakefield's sales

agents. Mr. Mitchell does not recall reviewing the annotations on the Floor Plan.

[64] Mr. Mitchell's testimony was that train noise, idling or otherwise, was not a matter he discussed with Grant Thornton. He also said that train noise was not discussed with any potential sublease tenants, including CanDeal. In the answers to undertakings, it emerged that there were some conversations between Grant Thornton and the Cushman & Wakefield sales agents.

[65] The parties agree that there were no conversations between Cushman & Wakefield and CanDeal about train noise from idling trains or from moving trains for that matter. The parties agree that there were no conservations between Grant Thornton and CanDeal about train noise from idling trains or from moving trains for that matter.

[66] Grant Thornton provided Cushman & Wakefield with an Excel document setting out a schedule of preferable times for site visits. The schedule referred to times of the day with high elevator traffic. As it happens, the building's elevators were under construction, and the Excel document indicated when significant lineups could be avoided.

[67] CanDeal submits that the Excel document was part of a plan to orchestrate the timing of site visits so that they would not occur at times of train idling noise. This is denied by Grant Thornton and Cushman & Wakefield's witnesses.

[68] It is in any event a preposterous submission because train idling occurred randomly throughout the day. It would have been impossible to diminish the likelihood of CanDeal and its real estate agent noticing idling train noise by scheduling the commencement of site visits. Moreover, idling train noise could occur at any time during a site visit regardless of the time of commencement of the site visit and, as will be noted below, CanDeal's site visits lasted as long as six hours.

[69] In **July 2019**, Cushman & Wakefield prepared a marketing brochure that conspicuously noted in photographs the proximity of the premises to Union Station. The marketing materials included the Floor Plan for Grant Thornton's premises without the 2018 legend with its annotations.

[70] Cushman & Wakefield presented Grant Thornton's premises to various prospective subtenants, including CanDeal, which was being assisted by Mr. Lyons of Lennard Commercial Realty.

[71] On **September 11, 2019**, after receiving a request from Mr. Lyons, Mr. Mitchell provided him with a copy of the marketing materials for Grant Thornton's premises including the Floor Plan.

[72] On **September 13, 2019**, Mr. Lyons visited Grant Thornton's premises along with Ms. Milner and Mr. Kowalik. They walked around and looked at the entire 12th floor.

[73] On **September 18, 2019**, Mr. Lyons and CanDeal's Mr. Horner and Mr. Kowalik visited Grant Thornton's premises. They met with Ms. MacDonald and Ms. Hatton from Grant Thornton and Mr. Mitchell from Cushman & Wakefield.

[74] On **September 24, 2019**, Mr. Lyons presented to Grant Thornton an offer to sublease on behalf of CanDeal.

[75] On **October 11, 2019**, Ms. Wettlaufer and Mr. Ladner met Mr. Horner, Mr. Kowalik, and Ms. Milner to discuss terms of a possible sublease.

[76] On **October 15, 2019**, Mr. Lyons asked Mr. Mitchell for a copy of the Floor Plan so that CanDeal could obtain a quote for the tenant's improvements. Mr. Mitchell sent the Floor Plan to Mr. Lyons the following day.

[77] On **October 23, 2019**, Mr. Lyons and CanDeal's Mr. Horner, Mr. Kowalik, and Ms. Milner visited Grant Thornton's premises at 50 Bay Street at 10:00 a.m. Mr. Mitchell was in attendance during the visit. Subsequently, Mr. Lyons informed Mr. Mitchell that he had instructions to prepare an Offer to Sublease.

[78] On **October 31, 2019**, CanDeal and Grant Thornton agreed on the terms of the Offer to Sublease. The terms of the Offer to Sublease included, a term incorporating the terms of the head lease as follows:

> *12. Head Lease*
>
> The Sublandlord and Subtenant acknowledge and agree that, with respect to the Premises and except as provided herein, the terms, conditions, covenants and agreements contained in the Head Lease shall apply to the Sublease and shall be binding upon the Subtenant under the Sublease as if it were the tenant under the Head Lease. If there is any conflict between the provisions of this Offer to Sublease and/or the Sublease Agreement and the provisions of the Head Lease, then the provisions of the Head Lease shall prevail.

[79] Having agreed on the Offer to Sublease, the parties began negotiations for a formal sublease. CanDeal was represented by its own lawyers. Grant Thornton was represented by its own lawyers. Cushman & Wakefield did not provide advice, legal or otherwise with respect to the negotiations for a formal sublease. The Head Landlord was represented by its own lawyers.

[80] On **November 1, 2019**, CanDeal's representatives attended at Grant Thornton's premises at 10:00 a.m.

[81] On **November 5, 2019**, Mr. Mitchell provided Mr. Lyons with a copy of the Head Lease. A copy was forwarded to CanDeal and to CanDeal's lawyers.

[82] On **November 7, 2019**, both parties waived the conditions within the Offer to Sublease.

[83] On **November 8, 2019**, CanDeal's representatives visited Grant Thornton's premises from 9:00 a.m. to 11:00 a.m.

[84] On **November 27, 2019**, CanDeal's representative visited Grant Thornton's premises from 12:00 p.m. to 1:00 p.m.

[85] On **December 18, 2019**, CanDeal's representative attended at Grant Thornton's premises at 9:00 a.m.

[86] In **January 2020**, Grant Thornton vacated its offices at 50 Bay Street. It relocated its employees in the office building at 200 King Street.

[87] On **January 7, 2020**, CanDeal's representative visited Grant Thornton's premises at 11:30 a.m.

[88] On **January 14, 2020**, CanDeal's representative visited Grant Thornton's premises from 10:00 a.m. to 4:00 p.m.

[89] On **January 15, 2020**, CanDeal's representative visited Grant Thornton's premises between 10:00 a.m. to 4:00 p.m.

[90] On **January 16, 2020**, CanDeal's representative visited Grant Thornton's premises from 10:00 a.m. to 4:00 p.m.

[91] I find as fact that there never was a conspiracy or "premeditated strategy" as alleged by CanDeal to conceal from CanDeal or its representatives the noise from idling trains.

[92] I believe Mr. Mitchell that such a plot was never discussed with him. I believe his evidence, that he never did anything in furtherance of such a conspiracy. He did not know and never inquired about the scheduling of trains and when it was most likely that there would be idling trains. Moreover, it would have been impossible to have succeeded in such a strategy. Pulling off such a strategy would require knowing when there would be idling trains; however, this was an impossibility because idling trains was a random event that could not be predicted and thus the strategy was an impossibility.

[93] The proposition that idling trains were more likely to occur around 9:00 a.m. in the morning is a sound idea, but CanDeal's visits were not confined to that part of the day.

[94] In any event, even if the strategy existed, which it did not, it would and did inevitably fail. I find as a fact that enhanced noise from idling trains did occur and frequently occurred during CanDeal's visits to the premises. However, the CanDeal people and their representatives were not bothered by the idling train noise just as Grant Thornton's employees had not been bothered by it. It is likely that given CanDeal's extensive renovations that opened up the space at Grant Thornton's former premises that train noise became more patently conspicuous than had been the case before the renovations.

[95] Further, while it is believable that CanDeal's representatives and its real estate agent (and for that matter also Mr. Mitchell) did not perceive bothersome train idling noise, the explanation is that they were not paying attention. And their want of attention cannot be attributed to being distracted or by being denied the opportunity to hear what was possible to hear.

[96] During all of the site visits and during the contract negotiations for a sublease, CanDeal was aware of the possibility of train noise but gave the matter no attention. CanDeal's representatives and its real estate agent did not ask Mr. Mitchell, Grant Thornton's representatives or Grant Thornton's employees any questions about train noise. CanDeal did not instruct its lawyers to raise the issue of train noise at any point during the sublease negotiations.Given the proximity of the premises to Union Station, CanDeal was aware of the possibility of train noise, but it did not commission any acoustical studies with respect to the impact of its proposed renovations on the audibility of external noise sources. CanDeal was also aware of the provisions in the head lease and in the sublease exculpating Grant Thornton for any liability for train noise.

[97] In **January 2020**, CanDeal and Grant Thornton signed a Sublease Agreement dated **January 22, 2020**.[15] For present purposes the following provisions of the Sublease Agreement as amended are pertinent:

> *14. Acceptance of Premises:*
>
> […] Subtenant acknowledges that it has inspected the Subleased Premises and is fully satisfied with its condition and accepts the same "as is" and "where is", subject to Sublandlord providing the

[15] On October 30, 2020, CanDeal and Capservco signed a Sublease Amendment to shorten the fixturing period and the commencement date, which provided it with a more favourable accounting treatment. Nothing turns on the Sublease Amendment.

> Subleased Premises in a clean and "broom swept" condition, free of any and all debris. Save and except as provided herein, Sublandlord has made no representations or warranties or any nature whatsoever with regard to the Subleased Premises or the suitability of the Subleased Premises for Subtenant's intended use and Sublandlord shall have no obligation or duty with regard to preparation of the Subleased Premises for occupancy by Subtenant. Any modifications or alterations to Subleased Premises necessary for the use of Subtenant or Subtenant's responsibility for compliance with laws will be at the sole cost and expense of Subtenant.

[98] In **March 2020**, CanDeal took possession of the premises and undertook extensive tenant improvements, which were completed in **October 2020**. CanDeal changed the closed-office layout on the north side of the Premises to an open concept office space layout.

[99] CanDeal's witnesses said that the noise of idling trains when it occurred made working conditions intolerable. They said that when the noise occurred the employees stopped work, and some chose to work remotely rather than attending the office to avoid the Idling Train Noise. Those who came to work would break from their work because of the noise and it took from seconds to several minutes to recover and regain sufficient concentration to resume computer programming which was a key aspect of CanDeal's business. Professor Laroche interviewed six CanDeal employees and she concluded that the noise conditions were such that the employees would not be able to concentrate and perform complex cognitive tasks.

[100] I have no reason not to believe this evidence that idling train noise from time to time bothered CanDeal's employees and interfered with their cognitive capacity to work. However, I also believe that the situation was different for the former occupants of the premises; Grant Thornton's employees were not bothered by the noise emitting from trains idling or moving in or out of Union Station.

[101] On **November 29, 2021**, CanDeal's litigation counsel (Blaney McMurtry LLP) wrote Grant Thornton's general counsel a letter enclosing a draft Statement of Claim and the reports of Professor Laroche and of Mr. Busch. CanDeal's counsel submitted that Grant Thornton was aware of and did not disclose and intentionally prevented CanDeal from discovering that there was excessive noise from idling trains that were so intense as to interfere with the abilities of CanDeal's employees to work at the premises. CanDeal's counsel submitted that the premises were unfit for CanDeal's purposes. He submitted that Grant Thornton's actions and omissions constituted a misrepresentation, knowingly failing to disclose a latent defect and were a breach of its duty of good faith and honest performance owed to CanDeal. He said that had CanDeal known about the train noise problem, it would not have entered into the sublease.

[102] On **December 17, 2021**, CanDeal commenced an action against Grant Thornton seeking among other things a declaration that the Grant Thornton's premises were subject to a latent defect in respect of train noise. CanDeal sought an order declaring the sublease void by reason of concealment and negligent misrepresentation.

E. Procedural Background

[103] As just noted, on **December 17, 2021**, CanDeal commenced its action against Grant Thornton.

[104] On **February 17, 2022**, Grant Thornton delivered its Statement of Defence.

[105] In **July 2022**, Grant Thornton brought a motion for a summary judgment, and on **July 25,**

2022, Ms. Wettlaufer swore an affidavit.

[106] On **August 9, 2022**, Mr. Busch swore an affidavit for CanDeal.

[107] On **August 9, 2022**, Professor Laroche swore an affidavit for CanDeal in response to Grant Thornton's motion for a summary judgment.

[108] On **August 30, 2022**, Ms. Milner swore an affidavit for CanDeal.

[109] On **January 5, 2023**, CanDeal amended its Statement of Claim to add Cushman & Wakefield as a defendant and to plead a claim in conspiracy. CanDeal pleaded that Cushman & Wakefield owed it a duty of care and ought to have known that train noise would render the Property unfit for CanDeal's needs. CanDeal pleaded that Cushman & Wakefield had an obligation to disclose the train noise defect pursuant to the Code of Ethics for real estate brokers and that it negligently allowed or participated in Grant Thornton's concealment of the train noise.

[110] On **February 6, 2023**, Grant Thornton delivered an Amended Statement of Defence.

[111] On **February 9, 2023**, Cushman & Wakefield delivered its Statement of Defence.

[112] On **April 14, 2023**, Mr. Mitchell swore an affidavit for Cushman & Wakefield, and it brought a motion for a summary judgment.

[113] On **July 18, 2023**, Ms. Milner swore another affidavit.

[114] On **August 16, 2023**, Ms. Wettlaufer swore another affidavit.

[115] On **September 5, 2023**, pursuant to Rule 39.03, Ms. Hatton and Ms. MacDonald were summoned as witnesses by CanDeal.

[116] On **September 29, 2023**, Mr. Levkoe swore an affidavit for Grant Thornton.

[117] On **October 11, 2023**, Ms. Sabino swore an affidavit for Grant Thornton.

[118] On **October 12, 2023**, Ms. Wettlaufer was examined for discovery as the representative for Grant Thornton and she was cross-examined.

[119] On **October 13, 2023**, Ms. Milner of CanDeal was cross-examined.

[120] On **November 2, 2023**, Mr. Mitchell of Cushman & Wakefield was cross-examined.

[121] On **November 9, 2023**, Mr. Levkoe the expert for Grant Thornton was cross-examined.

[122] On **December 11, 2023**, Mr. Busch the expert for CanDeal was cross-examined.

[123] Grant Thornton's and Cushman & Wakefield's summary judgment motions were heard on February 13, 2024. I reserved judgment.

F. Is the Case Appropriate for a Summary Judgment?

[124] The first issue to determine is whether the case at bar is an appropriate one for a summary judgment.

[125] Rule 20.04(2)(a) of the *Rules of Civil Procedure*[16] provides that the court shall grant summary judgment if: "the court is satisfied that there is no genuine issue requiring a trial with

[16] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

respect to a claim or defence." With amendments to Rule 20 introduced in 2010, the powers of the court to grant summary judgment have been enhanced. Rule 20.04 (2.1) states:

> 20.04 (2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3. Drawing any reasonable inference from the evidence.

[126] *Hryniak v. Mauldin* does not alter the principle that the court will assume that the parties have placed before it, in some form, all of the evidence that will be available for trial. The court is entitled to assume that the parties have advanced their best case and that the record contains all the evidence that the parties will present at trial.[17] Thus, if the moving party meets the evidentiary burden of producing evidence on which the court could conclude that there is no genuine issue of material fact requiring a trial, the responding party must either refute or counter the moving party's evidence or risk a summary judgment.[18]

[127] In *Hryniak v. Mauldin*[19] and *Bruno Appliance and Furniture, Inc. v. Hryniak*,[20] the Supreme Court of Canada held that on a motion for summary judgment under Rule 20, the court should first determine if there is a genuine issue requiring trial based only on the evidence in the motion record, without using the fact-finding powers introduced when Rule 20 was amended in 2010. The analysis of whether there is a genuine issue requiring a trial should be done by reviewing the factual record and granting a summary judgment if there is sufficient evidence to fairly and justly adjudicate the dispute and a summary judgment would be a timely, affordable and proportionate procedure.

[128] If, however, there appears to be a genuine issue requiring a trial, then the court should determine if the need for a trial can be avoided by using the powers under rules 20.04 (2.1) and (2.2). As a matter of discretion, the motions judge may use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if their use will lead to a fair and just result and will serve the goals of timeliness, affordability, and proportionality in light of the litigation as a whole. To grant summary judgment, on a review of the record, the motions judge must be of the view that sufficient evidence has been presented on all relevant points to allow him or her to draw the inferences necessary to make dispositive findings and to fairly and justly adjudicate the issues in the case.[21]

[129] If a judge is going to decide a matter summarily, then he or she must have confidence that he or she can reach a fair and just determination without a trial; this will be the case when the

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[17] *Canada (Attorney General) v. Lameman*, [2008] 1 S.C.R. 372 at para. 11; *Dawson v. Rexcraft Storage & Warehouse Inc*., [1998] O.J. No. 3240 (C.A.); *Bluestone v. Enroute Restaurants Inc*. (1994), 18 O.R. (3d) 481 (C.A.).
[18] *Toronto-Dominion Bank v. 466888 Ontario Ltd*., 2010 ONSC 3798.
[19] 2014 SCC 7.
[20] 2014 SCC 8.
[21] *Campana v. The City of Mississauga*, 2016 ONSC 3421; *Ghaeinizadeh (Litigation guardian of) v. Garfinkle Biderman LLP*, 2014 ONSC 4994, leave to appeal to Div. Ct. refused, 2015 ONSC 1953 (Div. Ct.); *Lavergne v. Dominion Citrus Ltd*., 2014 ONSC 1836 at para. 38; *George Weston Ltd. v. Domtar Inc.*, 2012 ONSC 5001.

summary judgment process: (a) allows the judge to make the necessary findings of fact; (b) allows the judge to apply the law to the facts; and (c) is a proportionate, more expeditious and less expensive means to achieve a just result.[22] The motion judge is required to assess whether the attributes of the trial process are necessary to enable him or her to make a fair and just determination.[23]

[130] The analytic framework from *Hryniak v. Mauldin* requires the motions judge, after determining whether the case is appropriate for a summary judgment, to first determine if there is a genuine issue requiring a trial based only on the evidence without using the enhanced fact-finding powers under rule 20.04 (2.1). Second, if there appears to be a genuine issue requiring a trial, the motion judge should determine whether a trial could be avoided by: (a) by using the enhanced powers under rule 20.04 (2.1), which permit weighing the evidence, evaluating the credibility of deponents, and drawing any reasonable inference from the evidence; or (b) by using the power under rule 20.04 (2.2) to order that oral evidence be presented by one or more parties.[24]

[131] In my opinion, the case at bar is an appropriate case for summary judgments. As a matter of fact-finding, there are no genuine issues requiring a trial. The legal issues are not unique and the law about *caveat emptor* traces back to antiquity, hence the Latin name. The parties have filed comprehensive records. Although additional witnesses might have been called, the principal witnesses for each parties' respective cases have been called, and it can be assumed that neither party has held back favourable evidence. Grant Thornton's former premises have been renovated and cannot be tested for the sound quality during CanDeal's site visits and both sides have presented expert evidence with respect to the matter of idling train noise at these premises. I have more than adequate evidence to decide the issues.

[132] The case at bar, which essentially alleges fraudulent concealment by Grant Thornton and its real estate agent is certainly much less complex than *Hryniak v. Mauldin*, which was a case where fraud was proven on a summary judgment motion. The forensic machinery of a trial is not necessary to arrive at a just and fair determination of this case. It is an appropriate case for a summary judgment.

G. Discussion and Analysis

[133] There are legions of *caveat emptor* cases and each case depends on its own particular facts. In the immediate case the facts do not stack up for CanDeal.

[134] CanDeal's version of the facts is that: (a) Grant Thornton's national office at 50 Bay Street had defective soundproofing so that the perceived noise from idling trains at the adjacent Union Station typically exceeded 50 db (decibels), which is an unacceptable level of noise that would make the work environment intolerable to CanDeal's employees; (b) Grant Thornton and its real estate agent were aware of this defect in the premises, and (c) conspired together to conceal the defect from CanDeal in order to induce CanDeal to lease the premises (a sublease).

[135] CanDeal submits that the fraudulent concealment involved a plan to allow site inspections

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[22] *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 49 and 50.
[23] *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 51-55; *Wise v. Abbott Laboratories, Ltd.*, 2016 ONSC 7275 at paras. 320-336; *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.*, 2016 ONSC 5784 at paras. 122-131.
[24] *Royal Bank of Canada v. 1643937 Ontario Inc*., 2021 ONCA 98; *Hryniak v. Mauldin*, 2014 SCC 7 at para. 66.

to occur only at times when the defect of idling train noises did not manifest itself. CanDeal submits that it did not notice the noise problem until after it had refitted the premises and entered into occupation only to discover after spending over a million dollars that its employees experienced intolerable noise from idling trains.

[136] My findings of fact above do not support any part of CanDeal's theory of the case. When Grant Thornton occupied its premises at 50 Bay Street there was perceivable i.e. patent noise from both incoming and outgoing trains and also from idling trains. The noise was patent but there was no defect in the sound proofing of the premises. I find as a fact that such train noise as there was, was tolerable during Grant Thornton's tenure in the premises.

[137] There is no evidence as to what the premises' sound levels actually measured during Grant Thornton's tenure, but the evidence of the Grant Thornton witnesses, which is actually consistent with the evidence of CanDeal's witnesses is that there were no intolerable sound levels.

[138] In any event, assuming that this patent perception of train noise was a physical defect of the premises, there was no conspiracy to cover up the sounds to be perceived at the premises. Such a conspiracy is implausible because it would have involved distracting CanDeal from observing a random event which would have been an impossible feat to pull off.

[139] There is no believable evidence that Grant Thornton and Cushman & Wakefield tried to pull off this feat or that there was an agreement to attempt to do so. Such evidence as there is indicates that the feat would have failed because CanDeal attended at the premises on numerous occasions where the prospect of train idling was highest.

[140] Moreover, the prospect of train noise was something that CanDeal already knew about since it cannot escape notice that 50 Bay St. is adjacent to Union Station. And if CanDeal did not know about train noise, CanDeal was expressly told about the prospect of train noise because it was given notice of an exculpatory clause in the lease and in the sublease.

[141] The leasing documents specified that the landlord(s) were not responsible for train noise. In other words, there was no need or purpose for Grant Thornton and Cushman & Wakefield to conspire to cover up a phenomenon that was perceivable and that they had disclosed.

[142] What happened in this case is that CanDeal attended at the premises. It did not notice any noise problem, because it was not yet a noise problem. After taking occupancy, the problem manifested itself, likely caused by CanDeal's having reconfigured the layout of the offices from the office design used by Grant Thornton.

[143] The noise in the immediate case was not latent and so the exceptions to *caveat emptor* for latent defects do not apply. The case at bar bears some resemblance to *Tony's Broadloom and Floor Covering Ltd. v. NCM Canada Ltd.*, *supra*, which involved a patent presence of chemical contamination of the land that the vendor did not conceal. The Court of Appeal concluded that *caveat emptor* applied and did not grant the purchaser rescission.

[144] In cases of patent defects of physical quality that are not concealed by the vendor (and in the immediate case, there was no physical defect), the purchaser must protect itself by inspection or by contractual warranties.

[145] In the immediate case, it is not so much that CanDeal did not exercise due diligence in inspecting, although there are elements of that here given that CanDeal knew it was moving into premises close to a very busy train station and it had the opportunity to refit the premises fittingly

to its exigencies, but it is more that CanDeal's inspections would have revealed tolerable levels of noise from idling trains, which reflects the experience of Grant Thornton's employees and which would have reflected the experience of CanDeal or its representatives had they given the matter any thought, which they did not.

[146] In any event, neither Grant Thornton nor Cushman & Wakefield were under any obligation to disclose anything more than they did disclose. And they warned CanDeal through the terms of the head lease and the sublease that the premises were situated near a railway station. CanDeal acknowledged and agreed that Grant Thornton (and the head landlord) would not be liable or responsible in any way for any disturbance to CanDeal's business operations caused or contributed to by noise or vibrations in, on or around the premises resulting from the operation of the train station.

[147] Neither Grant Thornton nor Cushman & Wakefield made any misrepresentations by commission or omission. There was no conspiracy to cover up the patent situation with respect to the additional noise caused by idling trains. There was also no reliance on what Grant Thornton or Cushman & Wakefield may have said or not said. CanDeal had its own real estate agent, its own designer, and its own lawyers throughout the negotiations for the sublease. Neither Grant Thornton nor Cushman & Wakefield were asked about how reconfiguring the office space to move to a more open-space concept would affect the working conditions at the premises.

[148] CanDeal's legal situation is weaker than the unsuccessful purchaser in *Tony's Broadloom and Floor Covering Ltd. v. NCM Canada Ltd*., and it cannot put the blame on Grant Thornton or Cushman & Wakefield for what happened. Thus, it is not strictly necessary to discuss the exculpatory aspects of CanDeal's acknowledgement in the lease and the sublease of train noise being perceived at the premises.

[149] For completeness and because the matter of exculpatory provisions was fully argued, I conclude that clause 17.8, which is found in the head lease exculpates the Defendants from any liability for misrepresentations by commission or omission.

[150] The leading case on the enforceability of disclaimers and exculpatory provisions is the Supreme Court of Canada's decision in *Tercon Contractors Ltd. v. British Columbia*.[25] The contemporary approach to the enforcement of exculpatory provisions involves a three-stage analysis. In the first stage, the court asks whether as a matter of interpretation the exclusion clause applies to the circumstances. In the second stage, if the exclusion clause does apply, then the court asks whether the exclusion clause was unconscionable at the time the contract was made. In the third stage, the Court asks whether the Court should refuse to enforce the exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts. The residential power of the court to decline enforcement exists but will rarely be exercised.

[151] In the immediate case, as a matter of contract interpretation clause 17.8 applies to the circumstances of the idling train noise and it was not unconscionable for clause 17.8 to be made a part of the contract between Grant Thornton and CanDeal.

[152] I agree that fraud would be an overriding public policy factor that would make clause 17.8 unenforceable. This is true because fraud "unravels everything" and fraud cannot be excused or

[25] 2010 SCC 4.

exculpated by a disclaimer or an exculpatory contract provision;[26] however, there was no fraud or active concealment in the immediate case. The exculpatory contract provisions apply in the immediate case.

H. Conclusion

[153] For the above reasons, the summary judgment motions are granted.

[154] If the parties cannot agree about costs, they may make submissions in writing beginning with the Defendants' submissions within twenty days after the release of these Reasons for Decision followed by CanDeal's submissions within a further twenty days.

Perell, J.

Released: March 4, 2024

[26] *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399; *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, 2004 ABCA 309; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club. Ltd*., 2002 SCC 19; *1018429 Ontario Inc. v. FEA Investments Ltd*., [1999] O.J. No. 3562 (C.A.); *Francis v. Dingman* (1983), 43 O.R. (2d) 641 (C.A.), leave to appeal to S.C.C. refused, 23 B.L.R. 234n; *Nepean (Township) Hydro Electric Commission v. Ontario Hydro*, [1982] 1 S.C.R. 347; *Farah v. Barki*, [1955] S.C.R. 107 at p. 115 ; *Pearson & Son v. Dublin Corp*., [1907] A.C. 351; *May v. Platt*, [1900] 1 Ch. 616 at p. 623; *Central R. Co. of Venezuela v. Kisch* (1867), L.R. 2 H.L. 99.

CITATION: CanDeal Group Inc. v. Capservco Limited, 2024 ONSC 1315
COURT FILE NO.: CV-21-00673994-0000
DATE: 20240304

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CANDEAL GROUP INC.

Plaintiff

- and -

CAPSERVCO LIMITED PARTNERSHIP, BY ITS GENERAL PARTNER CAPSERVCO INC. and CUSHMAN & WAKEFIELD ULC/CUSHMAN & WAKEFIELD SRI

Defendants

REASONS FOR DECISION

PERELL, J.

Released: March 4, 2024