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(Winnipeg Centre)
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

MICHAEL JOHN BARRETT, SONIA MARIE BARRETT, ELVA LORIS MCTAGGART AND ELVA LORIS MCTAGGART AS EXECUTOR OF THE ESTATE OF KENNETH ROY MCTAGGART, DECEASED, plaintiffs,	)	Rocky Kravetsky for the plaintiffs
	)	Curran McNicol for the defendants
- and -	)	
LARRY VINCENT MACKAY, VALERIE JOAN MCKAY, LEONARD GEORGE DUBYTS AND VALERIE JOAN MACKAY, AS EXECUTORS OF THE ESTATE OF ELIZABETH DUBYTS, DECEASED, AND VALERIE JOAN MACKAY AS EXECUTOR OF THE ESTATE OF STEVE DUBYTS, DECEASED, defendants.	)	Judgment Delivered: March 16, 2023

BOCK J.

[1] This case concerns a landlord and tenant dispute about two leased lots in a cottage community on Pelican Lake. One is a large lakefront lot, identified as "Parcel A". The other, identified as "Lot 26", is located across the road from Parcel A. Valerie MacKay, who represents the group of defendants comprising the landlord, contends that the lease for Parcel A was forfeited when it was assigned by Elva McTaggart to Michael and Sonia Barrett without obtaining the landlord's prior consent. Ms. MacKay

also contends that the Barretts' lease of Lot 26 was terminated effective April 30, 2017 by a notice to vacate delivered to them in March 2016.

[2] For the reasons that follow, I conclude the lease for Parcel A remains in force. I also conclude the lease of Lot 26 was not terminated as alleged by Ms. MacKay, but that it did expire effective April 30, 2018.

Facts giving rise to this dispute

[3] This dispute arises out of an arrangement made in 1974 by Valerie Mackay's late father, Steve Dubyts, with the late Kenneth "Roy" McTaggart.

[4] Steve Dubyts was a Polish emigrant. Despite a lack of formal education, he was by all accounts a resourceful and entrepreneurial man. He farmed in the vicinity of Pelican Lake. In the 1960s he built and operated a hotel in nearby Belmont, Manitoba. In about 1968 he built a family cottage on land he owned bordering Pelican Lake, described as the "Section 27 property". In the early 1970s he conceived of an idea to develop the Section 27 property into a cottage community. That community eventually came to be known as "Miami Beach".

[5] Parcel A was one of the first cottage lots in Miami Beach. On March 16, 1974, Steve Dubyts and Roy McTaggart entered into a written form of statutory lease in respect of Parcel A, the "Parcel A Lease", for a term of 99 years, expiring on February 28, 2073.

[6] The terms of the Parcel A Lease include a one-time payment of $800 rent, which Mr. McTaggart paid in 1974. It contains a provision that if Parcel A is surveyed during the term of the lease in a manner that would allow a transfer of title "in accordance

with the practice of the local Land Titles Office and applicable statutes", the lessee could require a transfer of "good and marketable title", to be registered at the lessee's expense. It also includes the lessee's covenant to pay taxes as levied by the municipality against Parcel A, and not to assign or sublet Parcel A without leave of the lessor, such leave not to be unreasonably withheld. Non-performance of these covenants would entitle the lessor to re-enter the property. As will be discussed, the covenant not to assign without consent figures prominently in this dispute.

[7] Around that same time, Steve Dubyts entered into two more 99-year leases with one-time payments. One was with a tenant named Constant. The other was with tenants named Ross and Denise Turner, for a lot identified as "Parcel B". In 1980 Parcel B was assigned by the Turners to a couple named Williams.

[8] For reasons unknown, after entering into these three 99-year leases, Steve Dubyts changed his approach to the development of Miami Beach. He divided the property into nine blocks, and divided the blocks into more or less standard-sized cottage lots. Each block and lot was identified numerically. The Barretts' lot, for instance, is identified as "Lot 26 – Block 5". Mr. Dubyts leased these lots to tenants for five-year terms in return for annual payments of rent and municipal taxes. Initially, these leases also gave tenants the option to renew the lease for a further five-year term, subject to an adjustment in rent for the renewed term.

[9] In this way Miami Beach came to be what it is today – a cottage community comprising more than 100 leased cottage lots. The Parcel A Lease was registered by

caveat against title to the Section 27 Property, but Parcel A has never been surveyed and no legal subdivision has ever been undertaken.

[10] In 1983 Steve Dubyts's daughter, Valerie MacKay, joined him in the management of Miami Beach, a position she has continued to hold to this day. She appears to have introduced an element of consistency, order and organization to the operation that was perhaps lacking under her father's management. She collected rent and dealt with tenants. In the mid to late 1980s, she created a sketch, filed as Exhibit 1-10, depicting the location of each lot. She also worked to standardize all of the tenant leases. By the early 1990s she had succeeded in bringing all tenants onto the same five-year rent cycle, at the same annual rent, on substantially identical terms contained in a written lease which she prepared using a blank, pre-printed form obtained from a stationer's store. (The Parcel A Lease was prepared using the same kind of pre-printed form.) As part of this standardization process, Ms. MacKay eliminated tenants' renewal options. Instead, as the end of each five-year term approached, she offered each tenant a new five-year lease on substantially the same terms, subject to an adjustment in rent for the next five-year term.

[11] Steve Dubyts died in 1991 and his wife, Elizabeth, died in 2003. Title to Miami Beach, along with Mr. Dubyts's rights and obligations as landlord under the Parcel A Lease, ultimately devolved to their daughter, Valerie, and her husband, Larry MacKay.

[12] Until Mr. McTaggart's retirement in 1993, the McTaggarts would use Parcel A on summer weekends, staying in a travel trailer they had parked on it. After Mr. McTaggart's retirement, they set up a more substantial fifth-wheel trailer every

summer for the entire season. Sometimes they were joined by their adult daughter, Terri, and her family. Aside from an outhouse, the McTaggarts never built a structure on Parcel A.

[13] Across the road from Parcel A, Lot 26 was first leased by Steve Dubyts to Michael Barrett by a written lease dated May 23, 1988, for a term of five years with an option to renew for a further five years. Mr. Barrett proceeded to construct a cottage on Lot 26, with help from his parents, Bob and Roxy Barrett. Mr. Barrett has remained in possession of Lot 26 since then.

[14] The McTaggarts and Barretts were good neighbours. From soon after Michael Barrett began using Lot 26, the McTaggarts permitted him, and later his wife, Sonia, and their two children, to access Pelican Lake through Parcel A. In later years the McTaggarts also permitted the Barretts to install a removable boat dock and lift in the lake extending from Parcel A. In return, from time to time Michael Barrett mowed the grass on Parcel A and attended to minor maintenance matters.

[15] After Roy McTaggart's death in 2007, Elva McTaggart succeeded him as successor to his rights and obligations under the Parcel A Lease. She did not make regular use of Parcel A, but would attend a couple of times each year with her daughter, Terri, to inspect it.

[16] In 2014, Elva McTaggart applied for probate of Roy's will. Through Terri, she asked Michael Barrett, who is a realtor, to provide an opinion on the value of her interest in Parcel A in order to complete the estate inventory forming part of her

application for probate. Mr. Barrett's written opinion of value followed on May 29, 2014.

[17] On July 14, 2014, the Barretts offered to buy Elva McTaggart's interest in Parcel A. This would not have come as a surprise to Elva McTaggart, because in earlier years Mr. Barrett had expressed his interest in acquiring Parcel A to Roy McTaggart. The Barretts' offer was accepted, resulting in a bill of sale and an assignment of caveat, both stated to be effective August 1, 2014 (Exhibits 1-2 and 1-3, respectively). By these two documents Elva McTaggart assigned her rights as Roy McTaggart's successor to the Parcel A Lease to the Barretts. Notably, the MacKays' consent to the assignment was neither sought nor obtained.

[18] On August 1, 2014, Michael Barrett informed Ms. MacKay of the transaction between the Barretts and Elva McTaggart by e-mail. Referring to himself and his wife, Sonia, he wrote (Exhibit 1 – 4):

> … I just wanted to give you the courtesy, before you hear from an outside party, of letting you know we have taken over the lease on these lots [i.e., Parcel A]. I didn't think it fair for you to hear it from elsewhere as word will get out. We don't have any specific plans but to continue enjoying our cabin [i.e., Lot 26] and the properly [sic] across the road.

[19] Mr. Barrett was aware the landlord's consent to the assignment of the Parcel A Lease was required, and proceeded on the assumption that his lawyer would do what needed to be done to satisfy that requirement. He had been given to understand by his lawyer that formal notice of the assignment would be given to Ms. MacKay in due course by the Land Titles Office. In fact, the Barretts' lawyer did not take any steps to

secure Ms. MacKay's consent to the assignment, and the Land Titles Office did not communicate with Ms. MacKay.

[20] Ms. MacKay also knew that the assignment of the Parcel A Lease required the landlord's consent. She received and read Mr. Barrett's e-mail, but let it go without comment or protest.

[21] After August 1, 2014, the Barretts continued to use Parcel A as they had before. In September 2014 they installed a shed on it, measuring 12 by 16 feet. On October 31, 2014, they sent a cheque to Ms. MacKay representing payment for the tax assessment for Lot 26 and, for the first time, for Parcel A. Mr. Barrett included a note on the front of the cheque to indicate that the payment was in respect of both properties, and a second note to indicate the specific amount paid for each property. Parcel A is described in both notes as "Lots 1/2 - 4", which corresponds to Lots 1 and 2 in Block 4 on Ms. MacKay's plan (Exhibit 1-10). The cheque was deposited by Ms. MacKay within a few days, also without comment or protest.

[22] The summer of 2015 proceeded uneventfully. At the beginning of that year's cottage season Mr. Barrett again installed a dock at Parcel A, as he had in previous years. Ms. MacKay asked him to reposition it, which he did. Other than that, Ms. MacKay raised no concerns with respect to the Barretts' use of Parcel A.

[23] The next communication between the Barretts and the MacKays concerning Parcel A did not occur until October 23, 2015, when Mr. Barrett telephoned Ms. MacKay to ask for the tax notice for Parcel A. (He had already received the tax notice for Lot 26 in July.) In reply, Ms. MacKay told him that she had sent the tax notice to Elva

McTaggart, because according to her "records", Ms. McTaggart was still the tenant of Parcel A. Without satisfactory documentary evidence of the transfer of the Parcel A Lease, Ms. MacKay was not prepared to provide Mr. Barrett with the tax information he was seeking.

[24] This conversation was followed later that day by a lengthy and detailed e-mail from Mr. Barrett to Ms. MacKay (Exhibit 1-7), to which he attached copies of the transaction documents between the Barretts and the McTaggarts for Ms. MacKay's records.

[25] Ms. MacKay consulted a lawyer with respect to the documents Mr. Barrett had sent to her. Thereafter, she had her counsel send a demand letter to Michael Barrett and Elva McTaggart, dated November 23, 2015 (Exhibit 1-9). In that letter the MacKays asserted, for the first time, that the "[Parcel A] Lease is considered forfeited and at an end" because of Elva McTaggart's failure to obtain the MacKays' prior consent to the assignment. Elva McTaggart and the Barretts disputed that position. On January 28, 2016, the MacKays commenced an application to dispossess the Barretts from Parcel A. That application was stayed pending the resolution of this action, which the plaintiffs commenced in the summer of 2016 to resolve both the dispute concerning Parcel A and Lot 26.

[26] This leads me to return, briefly, to the Barretts' tenancy of Lot 26. In 1987 Michael Barrett entered into a written lease with Steve Dubyts for a five-year term, with an option to renew for a further five-year term. As mentioned earlier, it was during these first five years that Mr. Barrett and his parents constructed a cottage on the lot.

Mr. Barrett exercised his option to renew, and entered into a subsequent five-year lease with Elizabeth Dubyts in 1993 (Exhibit 1-16). In 1998, this time with his mother and father, Mr. Barrett exercised the option to renew for another five-year term, and entered into a third lease (Exhibit 1-17). This lease, as distinct from the earlier leases, did not include an option to renew.

[27] There were no written leases between the Barretts and the MacKays after 1998. Valerie MacKay did present the Barretts with new written leases every five years, and she did ask that they sign and return them to her. Due mainly to their own laxity and inattention, the Barretts failed to attend to her request. Nevertheless, Michael and Sonia Barrett continued in possession of Lot 26 following the expiry of the last written lease, in 2003, in the same manner as they had before. They continued to receive notices of rent increases every five years, and notices of annual tax assessments. They paid rent and tax as required, although sometimes their payments were late, another example of their laxity and inattention. But in those instances, the MacKays charged, and the Barretts paid, interest on the amount outstanding at the rate stipulated in their last written lease. Despite these occasional lapses, through the years Ms. MacKay had found the Barretts to be very satisfactory tenants, and before this dispute their relationship had been very cordial.

[28] By letter dated March 8, 2016, the MacKays, having already served demand on the Barretts for possession of Parcel A in November 2015, also gave notice to the Barretts to vacate Lot 26 on or before April 30, 2017 (Exhibit 1-24). In that letter the MacKays advanced the position, for the first time, that the Barretts' continued

occupancy of Lot 26 after 2003 without a written lease had left them as overholding tenants or, at best, as tenants from year to year.

[29] The Barretts did not vacate Lot 26. Instead, on July 13, 2016, they commenced this action with Elva McTaggart and the estate of her late husband, Roy, in respect of both Parcel A and Lot 26.

[30] Since 2016 the Barretts have remained in possession of Lot 26 and Parcel A, and they have continued to use both, though their right to do so has been in dispute.

[31] For their part, since 2016 the MacKays have refused to accept payments of rent and taxes for Lot 26 and payments of taxes for Parcel A.

The issues at trial

[32] Broadly speaking, at issue is whether the Parcel A Lease was forfeited for lack of the MacKays' prior consent to Elva McTaggart's assignment of it to the Barretts, and whether the Barretts' lease in respect of Lot 26 has been validly terminated effective April 30, 2017.

[33] As I will discuss, I find the MacKays elected to waive their right of re-entry and forfeiture in respect of the Parcel A Lease. In the alternative, I find the MacKays' right of re-entry and forfeiture was not enforceable because they failed to provide Elva McTaggart notice to remedy her breach in accordance with s. 18(2) of ***The Landlord and Tenant Act***, C.C.S.M. c. L70.

[34] As regards the Barretts' lease in respect of Lot 26, I find the MacKays' notice to vacate by April 30, 2017 was not legally effective. Rather, I find that by their conduct after 2003 the parties agreed to enter into a succession of leases, each for a term of

five years, on the same terms as the last written lease they had entered into in 1998, subject to the agreed-upon rent increases. Accordingly, the five-year term of the last lease expired on April 30, 2018.

Discussion

(a) The MacKays elected to waive their right of re-entry and forfeiture

[35] The law with respect to forfeiture is well settled. The following statement from Esten Kenneth Williams & F.W. Rhodes, *The Canadian Law of Landlord and Tenant*, 4th ed (Toronto: Carswell, 1973) at 503, provides a useful starting point:

> The right to forfeit whether for breach of condition or breach of covenant is exercisable at the option of the lessor only, and he may elect not to avail himself of it. The question of election is one of fact and the lessor's intention to forfeit or not to forfeit can only be determined by his unequivocal acts.

The author goes on to note at p. 504 that there "can be no waiver without knowledge on the part of the landlord of the existence of his right to forfeit", citing ***Fitzgerald v. Barbour*** (1908), 17 O.L.R. 254.

[36] The MacKays submit the Parcel A Lease was breached by Elva McTaggart when she assigned the lease to the Barretts without their prior consent. That breach entitled them to re-enter the property and to forfeiture of the lease. There was no waiver, because they did not know of the existence of their right to forfeiture until they had obtained legal advice on the point.

[37] In response, the Barretts submit the MacKays elected to accept the assignment and thereby waived their right of forfeiture and re-entry. This is evidenced by their conduct after August 1, 2014, when Michael Barrett sent Valerie MacKay his e-mail to inform her that they had "taken over the lease" on Parcel A.

[38] I do not accept the MacKays' submission on this point. As I discuss below, I am satisfied on the basis of Ms. MacKay's evidence that by the time she received Mr. Barrett's e-mail of August 1, 2014, she had read and understood the contents of the Parcel A Lease, including the covenant not to assign and the lessor's right of re-entry for breach of that covenant. She knew Elva McTaggart had the right to assign the Parcel A Lease subject to her consent, which could not be unreasonably withheld. She also understood Michael Barrett's e-mail of August 1, 2014 to mean that Elva McTaggart had assigned the Parcel A Lease to the Barretts. Finally, she knew there was no reasonable basis upon which she could withhold her consent to an assignment by Elva McTaggart to the Barretts. Given the circumstances, I am led to conclude that on first learning of the assignment, Ms. MacKay quite reasonably elected to accept it.

[39] At trial, Ms. MacKay presented as a very capable, intelligent, and organized businesswoman. By 1983 she was well qualified by education, aptitude and experience to assist her father in the management of Miami Beach. After graduating from high school in 1970, she worked for three years in Winnipeg as a secretary. From approximately 1973 to 1980 she worked "off and on" as a bank teller in Belmont, serving as an assistant to the manager. In her words, a small town teller "does it all", including witnessing the execution of legal documents as a commissioner for oaths. At the same time, she worked with her husband in their substantial family farming operation.

[40] Ms. MacKay testified that when the Parcel A Lease came into her possession after her father's death in 1991, she read it. The evidence gives me no reason to doubt

that she fully understood its contents. By then she had prepared dozens of similar forms of lease for execution by tenants of Miami Beach containing similar, if not identical, terms with respect to assignment, forfeiture and re-entry. In the years that followed she probably prepared hundreds more.

[41] By 2014 Valerie MacKay was also aware, through personal experience, that Elva McTaggart's interest in the Parcel A Lease could be legally transferred to another tenant, because to her knowledge it had already been transferred once, from Roy McTaggart's estate to Elva. She also had the example of the assignment of the Parcel B Lease from the Turners to the Williams.

[42] Tellingly, Valerie MacKay had herself expressed interest in acquiring Elva McTaggart's interest in Parcel A. In an e-mail dated April 8, 2013 to Ms. McTaggart's daughter, Terri (Exhibit 1-31), Valerie MacKay asked if Elva might "have any intention to let these lots [i.e., Parcel A] go?", because the MacKays were interested in acquiring the property with a view to building their retirement home on it. In a follow up e-mail dated May 26, 2013, Ms. MacKay asked Terri to keep them in mind "when you decide who should be considered for the new tenant on your lots" (Exhibit 1-31).

[43] Valerie MacKay acknowledged in her testimony that she understood Elva McTaggart and the Barretts would "need her to sign" with respect to the assignment of the Parcel A Lease, and that she could not withhold her consent to the assignment unreasonably. She also acknowledged that by his e-mail of August 1, 2014, Michael Barrett was informing her that the Barretts had "taken over the lease". The evidence gives me no reason to doubt that Ms. MacKay understood this to mean that Elva

McTaggart had decided that the "new tenant" on Parcel A would be the Barretts, and not the MacKays.

[44] I come to this conclusion despite Ms. MacKay's testimony that Mr. Barrett's e-mail of August 1, 2014 had left her confused and shocked. I do not believe her, for the reasons set out above. Rather, the inference I draw is that Ms. MacKay understood the e-mail and was disappointed by it, because she and her husband had hoped to acquire Parcel A for themselves. Had it been otherwise – that is, had Ms. MacKay truly not understood the situation with respect to Parcel A on August 1, 2014 – I would have expected her to contact either Terri McTaggart or Michael Barrett for an explanation, in keeping with the consistent, orderly and organized approach she had always taken to the management of Miami Beach. But she did not contact either of them, which suggests to me she did not need to.

[45] I infer from Ms. MacKay's receipt of the notice of the assignment on August 1, 2014, and the lack of any reaction to its contents, that she initially elected to accept Elva McTaggart's assignment of the Parcel A Lease to the Barretts, thereby waiving her right of forfeiture and re-entry.

[46] Ms. MacKay's decision to accept the assignment is also evidenced by her acceptance and negotiation of the Barretts' tax payment for Parcel A in October 2014. Her suggestion at trial that she was unsure why the Barretts were paying the taxes in respect of Parcel A is simply not credible in light of the information she had received from Michael Barrett in his e-mail of August 1, 2014, and the payment details on the cheque itself.

[47] Eventually, 15 months after receiving notice of the assignment, the MacKays reversed their position and sent their demand letter of November 23, 2015. Their failure to raise any objection to the obvious fact of the assignment in the meantime, however, is further evidence of their initial decision to accept the Barretts' new tenancy of Parcel A.

[48] The demand letter sent by the MacKays' counsel on November 23, 2015 asserted that the Parcel A Lease was "forfeited and at an end", ostensibly because "[i]t is an express condition of the Lease that it shall not be assigned without first obtaining the consent of MacKay", and the failure to obtain that consent "is a clear breach of the Lease." But these matters were well known to Ms. MacKay on August 1, 2014. Her receipt of the transaction documents on October 23, 2015 did not add anything meaningful to her understanding of the assignment from Elva McTaggart to the Barretts. In my view, the MacKays' demand letter was a belated and ultimately futile effort to undo the election they had made 15 months earlier.

[49] To conclude this section of my reasons, I find Ms. MacKay was notified on August 1, 2014 that Elva McTaggart had assigned the Parcel A Lease to the Barretts. She knew her consent to that assignment was necessary, and that it had not been sought. But she also knew that had her consent been sought, she had no reasonable basis to withhold it, because, despite their occasional laxity and inattention to detail, the Barretts had been very satisfactory tenants of Lot 26 for over 25 years. For these reasons, I find Ms. MacKay deliberately chose not to act on Ms. McTaggart's breach of

her covenant not to assign without consent, and instead elected to accept the assignment of the Parcel A Lease to the Barretts.

(b) In the alternative, the MacKays' right of re-entry and forfeiture was not enforceable because of their failure to give notice in accordance with s. 18(2) of *The Landlord and Tenant Act*.

[50] If I am mistaken in finding that the MacKays elected to accept the assignment of the Parcel A Lease, I would nevertheless find that their right of re-entry and forfeiture was not enforceable, because the MacKays failed to provide Elva McTaggart notice to remedy her breach in accordance with s. 18(2) of ***The Landlord and Tenant Act***.

[51] Section 18(2) provides:

> **Restrictions on and relief against forfeiture**
> 18(2) 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 other than a proviso in respect of the payment of rent, shall not be enforceable, by action, entry, or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach.
> [underlining added]

[52] The plaintiffs acknowledge Elva McTaggart's breach of the covenant not to assign the Parcel A Lease without consent gave rise to a right of re-entry and forfeiture. However, they submit, s. 18(2) of ***The Landlord and Tenant Act*** suspended the enforceability of that right "unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach"… The demand letter sent by the MacKays' lawyer on November 23, 2015 failed to satisfy the requirements of s. 18(2) because,

although it gave notice "specifying the particular breach complained of", it did not include a statement "requiring the lessee to remedy the breach," so depriving Elva McTaggart an opportunity to do so. As a result, the MacKays' right of re-entry and forfeiture was not enforceable "by action, entry, or otherwise".

[53] In reply, the MacKays assert their demand letter did meet the requirements of s. 18(2), because it gave notice specifying the breach complained of. A statement "requiring the lessee to remedy the breach" is only necessary "if the breach is capable of remedy." As a matter of law, the MacKays argue, breach of a covenant not to assign without consent is not "capable of remedy". Such a breach, once committed, automatically and irrevocably triggers a lessor's right of re-entry and forfeiture. In support of their argument they cite ***Hamilton v. Ferne and Kilbier***, [1921] 61 D.L.R. 213, 1920 CanLII 360 (BC C.A.), ***Mus v. Matlashewski***, [1944] 4 D.L.R. 522, [1944] M.J. No. 32 (Man. C.A.), and ***Wakefield v. Cottingham***, [1959] O.R. 551, 1959 CanLII 147 (ON C.A.).

[54] I am not persuaded by the MacKays' submissions on this point, for two reasons.

[55] First, whether or not breach of a covenant is capable of remedy depends on the facts: ***Mount Citadel Ltd. v. Ibar Developments Ltd.***, [1976] 14 O.R. (2d) 318, 73 D.L.R. (3d) 584 (Ont. Sup. Ct. J.) (pp. 17 – 18). On the facts of this case, I find Elva McTaggart's breach was easily and obviously capable of remedy.

[56] Had the MacKays served notice on Elva McTaggart to remedy her breach on November 23, 2015, she and the Barretts could have returned everyone, including the MacKays, to their original positions by rescinding the assignment agreement and

restoring Elva McTaggart's tenancy. In that event, I expect their next step would have been to revive their transaction, only this time pausing to seek and obtain the MacKays' consent to the assignment in strict compliance with the terms of the Parcel A Lease – consent which the MacKays would have had no reasonable basis to refuse.

[57] Second, I reject the MacKays' assertion that as a matter of law, breach of a covenant not to assign is a breach "not capable of remedy." As I will explain, such a conclusion is not supported by either a plain reading of ss. 18 and 19 of ***The Landlord and Tenant Act*** or the authorities to which the MacKays have referred me.

[58] Section 19(1) of ***The Landlord and Tenant Act*** gives the court jurisdiction to grant a lessee relief from a right of re-entry or forfeiture. Section 19(7)(a) imposes limits on the court's authority to grant such relief by explicitly providing that s. 19 does not extend "to a covenant or condition against the assigning, under-letting, parting with the possession, or disposing of the land leased; … ." Importantly, however, s. 19(7) does not relieve the lessor from its obligation to comply with the notice requirements of s. 18(2), nor does it stipulate that breach of a covenant not to assign is a breach "not capable of remedy."

[59] Read together, therefore, ss. 18 and 19 leave open the possibility that a defaulting lessee may cure a breach not to assign without consent upon being given notice to do so under s. 18(2), but is prohibited by s. 19(7) from applying for relief from forfeiture under s. 19(1) if the breach cannot be cured.

[60] I also find the MacKays' reliance on ***Hamilton***, ***Mus*** and ***Wakefield*** to be misplaced.

[61] First, in none of those cases does it appear the parties argued, or the court considered, whether breach of a covenant to assign or sublet could be cured by the defaulting tenant, independent of the court's authority to grant relief from forfeiture.

[62] Second, the operative decision of each court cites the decision in ***Barrow v. Isaacs & Son***, [1891] 1 Q.B. 417, 64 L.J.Q.B. as effectively dictating the outcome of the case before it: ***Hamilton*** at p. 213, the majority in ***Mus*** at para. 57, and the majority in ***Wakefield*** at para. 4. But the precedential value of ***Barrow*** is so limited by the legislative context in which it was decided that neither it nor the cases that followed it provide any assistance to the MacKays.

[63] In ***Barrow***, the plaintiff lessor successfully sued to enforce a right of re-entry against the defendant lessees. The lessees had covenanted not to underlet their leased premises without first obtaining the lessor's written consent, which could not be arbitrarily withheld. The lease gave the lessor a right of re-entry should the lessees not observe and perform their covenant. The lessees proceeded to underlet a part of the premises without asking for the lessor's consent, because their solicitor had forgotten about the covenant in the head-lease. Had the lessor's consent been sought, the lessor would not have had any valid objection. As it was, the lessor had suffered no injury as a result of the lessee's breach.

[64] The court held in favour of the lessor, but only on the grounds that "[f]orfeiture for breach of this covenant is left to be dealt with according to the ordinary law and practice of Courts of Equity" and "that to grant such relief would not be a proper exercise of that discretion" (at p. 430).

[65] Significantly, the parties in ***Barrows*** were subject to the ***Conveyancing and Law of Property Act***, (1881), 44&45 Vict c. 41 (the "***Conveyancing Act***"). The court noted that while the ***Conveyancing Act*** required the lessor, in the case of any breach of covenant, to serve notice on the lessee specifying the breach and requiring a remedy before exercising a right of re-entry, it also "expressly provided that this does not extend to a covenant against assigning, underletting, parting with the possession or disposing of the land leased" (p. 430). Thus, the ***Conveyancing Act*** did not include notice provisions equivalent to those found in s. 18(2) of ***The Landlord and Tenant Act***, and therefore did not give the defaulting lessees in that case the right of opportunity to cure their breach.

[66] ***Barrows*** stops short of stating that breach of a covenant not to assign is incurable. At best, it reflects the court's reluctance to exercise its equitable jurisdiction to grant relief from forfeiture in favour of a party who has breached its covenant not to underlet without consent – a reluctance that has now been given statutory expression in the prohibition against relief from forfeiture contained in s. 19(7) of ***The Landlord and Tenant Act***.

[67] By contrast, the issue before me turns, at least in part, on a lessor's obligation under s. 18(2) of ***The Landlord and Tenant Act*** to give the defaulting tenant notice of the breach and demand that it be remedied. This issue did not arise in ***Barrows***, because the ***Conveyancing Act*** was explicit in not imposing such notice obligations on a lessor. ***Hamilton***, ***Mus*** and ***Wakefield*** must be read in that context. Like

Barrows, they only address the court's authority and discretion to grant a defaulting lessee relief from forfeiture.

[68] In summary, s. 18(2) of ***The Landlord and Tenant Act*** required the MacKays' notice of November 23, 2015 to include a statement requiring that the breach be remedied if "the breach is capable of remedy". Elva McTaggart's breach was "capable of remedy" – on the facts before me, it could be easily cured. The MacKays' notice did not include the required statement. As a result, any right of re-entry and forfeiture they might have had in respect of Elva McTaggart's assignment to the Barretts was not enforceable. The authorities on which the MacKays rely do not apply, because the question of the court's authority to grant relief from forfeiture does not arise in these circumstances.

(c) The lease of Lot 26 expired effective April 30, 2018

[69] The last written lease between the Barretts and the MacKays in respect of Lot 26 expired on April 30, 2003. Thereafter, I find the Barretts' tenancy in respect of Lot 26 was continued by the parties on the same contractual basis as it had been before 2003, despite the absence of, and Valerie MacKay's preference for, an executed lease in writing. The evidence of the parties' conduct after 2003 leaves me with no doubt on this point.

[70] The parties conducted themselves no differently after 2003 than before. Ms. MacKay adjusted the rent at the commencement of each new five-year period in 2003, 2008 and 2013. No new terms were introduced and no existing terms were amended. Rent and taxes were paid as required and, when payment was late, interest was calculated at the rate stipulated in their last written agreement.

[71] Ms. MacKay did make efforts from time to time to have the Barretts execute a written lease. I find her efforts to do so were for the purpose of memorializing the renewal of their agreement, in keeping with her long held and stated preference for accurate and complete record keeping. The Barretts are not to be commended for their repeated failure to attend to such a simple request. Despite that, I am satisfied that the parties' agreements to lease on five-year terms after the expiry of the 1998 lease were enforceable, and were not conditional on the execution of a written contract.

[72] It is obvious to me that the notice to vacate Lot 26 sent by the MacKays to the Barretts in March 2016 was precipitated by the dispute already surrounding the Parcel A Lease. That notice was based on the premise that the Barretts had been overholding tenants or, alternatively, tenants on a year-to-year basis, since 2003. That premise is not supported by the evidence, and the notice to vacate was therefore ineffective.

[73] Accordingly, I find after 2003 the Barretts and MacKays were party to a succession of five-year leases in respect of Lot 26, containing identical terms save for rent increases, the last of which expired on April 30, 2018. As such, the Barretts were entitled to remain in possession until that date, but, in the absence of a renewal of their lease, not thereafter.

[74] The parties did not make submissions with respect to the relief to which the MacKays might be entitled against the Barretts in respect of their status as overholding tenants after April 30, 2018. I remain seized of this matter with respect to this issue, and the parties may make further submissions on this point if necessary.

Conclusion

[75] Given my conclusions above, I do not find it necessary to consider the plaintiffs' additional claim, advanced as a further alternative, for relief from forfeiture under s. 35 of ***The Court of King's Bench Act***, C.C.S.M. c. C280.

[76] To summarize and repeat my conclusions:

(a) the Barretts are successors by assignment to all rights of the late Kenneth Roy McTaggart granted pursuant to the Parcel A Lease;

(b) the Barretts' lease of Lot 26 expired on April 30, 2018. Given my conclusion on this point, I remain seized of this matter to the extent necessary to resolve any further issues that flow from this determination.

[77] The parties have each met with partial success in these proceedings. Accordingly, I order that each side should bear its own costs.

[78] Finally, I can understand why the parties opted to have the very unusual terms contained in the Parcel A Lease adjudicated. However, now that their legal position has been clarified, I hope they can find some reasonable compromise and restore what seems for many years to have been a friendly and mutually agreeable relationship.

_____ J.