CITATION: The Canada Life Assurance Company et al. v. Aphria Inc., 2023 ONSC 6912
COURT FILE NO.: CV-22-00682888-0000
DATE: 20231212

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
THE CANADA LIFE ASSURANCE COMPANY, LG INVESTMENT MANAGEMENT, LTD. as trustee for IG MACKENZIE REL PROPERTY FUND and OPTRUST OFFICE INC. Applicant/Defendants to the Counterclaim	*Gasper Galati* and *Dina Peat*, for the Plaintiff/Defendants to the Counterclaim
– and –	
APHRIA INC. Defendant/ Plaintiffs by Counterclaim	*Derek J. Bell* and *Yuxi (Wendy) Sun* for the Defendant/Plaintiff by Counterclaim
	HEARD: September 21, 2023

CALLAGHAN, J.

REASONS FOR JUDGMENT

[1] *Stare decisis* has been at the centre of the common law for much of its history. In recognition of our judicial hierarchy, *stare decisis* requires lower courts to follow the principles set down by higher courts. However, in extremely limited circumstances, a lower court may depart from precedent. The defendant says this is such a case. The defendant invites me to disregard a principle arising from a Supreme Court of Canada case which has been applied by the Ontario Court of Appeal and trial courts in Ontario for 50 years.

[2] The precedent in issue addresses whether a landlord has an obligation to take steps to mitigate or avoid losses when a tenant unilaterally attempts to bring a lease to an end. Currently, the law provides that a landlord need not accept the tenant's repudiation of the lease and may insist on the performance of the lease. The landlord may sue for rent as it becomes due and has no obligation to mitigate the loss by re-letting the premises. The defendant is a tenant and says that,

among other reasons, the precedent is out of step with the law of mitigation and ought to be revisited.

[3] To say the least, the defendant makes a big ask in this case. For the reasons that follow, while the defendant makes some noteworthy submissions, I cannot accede to the request.

Facts

[4] Aphria Inc. (the "Tenant") leased Suite 2310, a 10,679 square foot commercial office (the "Premises"), at 1 Adelaide Street East, in Toronto (the "Building").

[5] The Tenant signed a lease dated June 6, 2018 (the "Lease"). The original counterparties to that Lease were OMERS Realty Corporation and CPP Investment Board Real Estate Holdings Inc. The Lease was for a term of ten years, with annual rent ranging between $309,000 and $395,123 (the “Rent”).

[6] The Building was sold in 2019. The new landlords and successors to the Lease are the Canada Life Assurance Company, I.G Investment Management, Ltd. as trustee for IG Mackenzie Real Property Fund and Optrust Office Inc. (collectively, the "Landlord"). The Landlord has a large global portfolio of real estate investments, and the Building is managed by a professional building manager.

[7] For its own business reasons, in early 2021, the Tenant had no further need for the Premises. After unsuccessfully seeking a consensual resolution with the Landlord, it wrote the Landlord and repudiated the remainder of the Lease. The correspondence flow was as follows:

(a) In March 2021, the Tenant wrote to the Landlord with a proposal for an early termination of the Lease, with an anticipated early termination date of June 30, 2021. The Landlord did not accept the proposal and advised that the Tenant had no right to unilaterally terminate the Lease and that the Tenant remained bound to perform all of its obligations under the Lease.

(b) In response, the Tenant purported to unilaterally terminate the Lease by way of a notice of repudiation dated August 26, 2021. It advised the Landlord that it would pay the Rent for August as well as the next three months. On or about August 26, 2021, the Tenant a vacated and removed all of its property from the Premises.

(c) On August 30, 2021, the Landlord responded to the Tenant's purported termination. It again advised the Tenant that it was under no obligation to accept the Tenant's repudiation and that it did not, in fact, accept the Tenant's repudiation of the Lease. The Landlord stated that it did not and had not elected to exercise its option to terminate the Lease. Rather, it confirmed that the Lease remained in full force and effect. It again reminded the Tenant that it remained obligated to fulfill its covenants under the Lease,

including its obligation to pay the full Rent as it came due throughout the term of the Lease.

(d) In a reply letter dated August 31, 2021, the Tenant confirmed that it had vacated the Premises. The Tenant took the position that the Landlord was obliged to mitigate its damages.

(e) The Landlord disagreed with the suggestion it had any obligation to mitigate by taking possession of and re-letting the premises. The landlord continued to treat the Lease as if it were operational. It sent reminders of the Rent owing and continued to never deny the Tenant access to the Premises.

[8] It is agreed that no Rent has been paid since December 1, 2021. Rent is claimed by the plaintiff from January 1, 2022, to the present.

[9] The Tenant's real estate broker provided leads of potential tenants to the Landlord. The Landlord did not follow up on the leads. The Landlord continued to assert that it was entitled to the amounts owing under the Lease as it did not accept the Tenant's repudiation. Consistent with this position, the Landlord took no steps to re-let the Premises, even though other units in the Building were being offered for lease. The facts, as stated above, are not only straightforward but agreed upon by the parties.

[10] There are two motions for summary judgment before me. The Landlord seeks judgment for the outstanding rent owed, being $638,171.40. This is the amount owing at the time of the hearing plus interest. It also seeks judgment for future Rents as they come due. The Tenant opposes the motion on the basis that the Landlord was required to mitigate, which it did not do. The Tenant, in a cross-motion, seeks a declaratory judgment that, if any Rent is owing, such amount is capped at the Rent owing for two years from the date of default, based on the Tenant's interpretation of s. 19.03 of the Lease. This last issue is distinct from the mitigation issue and, as discussed below, is a matter of contractual interpretation.

Issues

[11] The main event on this motion is the Tenant's argument on mitigation. The argument is focused on a 1971 decision of the Supreme Court of Canada. In *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd.*, [1971] S.C.R. 562 ("*Highway Properties*"), the Supreme Court held that a landlord had several options upon the repudiation of a lease by a tenant, including continuing as if the lease were still operational. In such circumstances, the landlord would be owed the rent as it became due and would have no obligation to mitigate. It is this case that the Landlord has relied upon to reject the suggestion that it is required to mitigate. The Tenant recognizes that if this remains the law, then it will be exposed to pay the whole term of the lease, subject to either the Landlord's voluntary mitigation or success on its argument regarding s. 19.03 of the Lease. However, the Tenant states this principle in *Highway Properties* ought not to be followed.

[12] The first substantive issue is, therefore, whether that principle in *Highway Properties* is binding and, if so, whether this court should strike out on a new path and disregard this precedent.

[13] The second substantive issue is less daunting as it only involves a contractual interpretation of the Lease and whether s. 19.03 caps any amount owing at two years of rent after default.

[14] Before addressing the substantive issues, it is necessary to consider whether summary judgment is the appropriate procedure to resolve this proceeding.

Summary Judgment

[15] Both parties submit this is a suitable case for summary judgment. The Supreme Court in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 49 provided the following guidelines as to when summary judgment is appropriate:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[16] In this case, there are few facts that will drive the resolution of either issue. The facts are not contentious. The Lease is not in dispute. The expressed repudiation of the Lease by the Tenant and the refusal to accept that repudiation by the Landlord is not in dispute. The Tenant's default in paying Rent after December 31, 2023, is not in dispute. The fact that the Landlord has not mitigated because it believes it does not have an obligation to do so is likewise not disputed. These are the essential facts that ground this motion. Neither party has any additional facts to proffer on this proceeding and both parties claim to have put their best foot forward. There is no benefit to the expense of a trial as the record would not change and credibility has not been raised as an issue by either party.

[17] Whether I am bound by *Highway Properties* does not require any additional facts. Similarly, the parties have advised that they have no additional facts that would assist on the interpretation of s. 19.03 of the Lease.

[18] On both issues, I agree with counsel that the matters raised may be determined on the current record by motion for summary judgment**.**

Highway Properties

[19] Tenant's counsel boldly and forcefully submits that the Supreme Court of Canada's decision in *Highway Properties* needs to be revisited. He asserts that *Highway Properties* has created an anomaly in contract law whereby commercial landlords have the option of ignoring a tenant's repudiation of a lease and proceed as if the lease continued to operate. The impact is that a landlord has no obligation to take reasonable steps so as to avoid accruing losses. The Tenant

asserts that in all other areas of commercial contract law, an innocent party to a repudiation is expected to take reasonable steps to mitigate or to avoid the losses associated with the breach and, if they do not, the court can deduct what might have been mitigated from any award of damages. As a matter of damage theory, it is said that "[l]osses that could reasonably have been avoided are, in effect, caused by the plaintiff's inaction, rather than the defendant's wrong": see *British Columbia v. Canadian Forest Products Ltd*., 2004 SCC 38, [2004] 2 S.C.R. 74, at para. 176.

[20] Even if I were to accept that *Highway Properties* ought to be revisited, the issue remains whether as a judge of a lower court, I am free to do so. As mentioned, the doctrine of *stare decisis* provides, in the vertical hierarchy of the judiciary, that lower courts are to follow the decisions of higher courts. There are exceptions where a lower court can depart from the precedent of a higher court, and I am urged by the Tenant that this is such a case.

[21] Historically, the development of property law was distinct from contract law. For most of the history of the common law, principles of property law, including leaseholds, did not mirror the principles in contract law. The evolution of this division between property and contract law is not important for the purpose of this case (for a review of this history see J. Brock and J. Phillips, "The Commercial Lease: Property or Contract?" (2000) 38 Alberta Law Review 989), but how the two areas of law address damages and mitigation are at the centre of the Tenant's argument.

[22] As a matter of property law, a lease is a conveyance of property. A lease conveys to the tenant the right to use the leased premises as if it held the freehold for the term of the lease and thereby creates a possessory interest for the tenant in the property. One of the impacts of this distinction was that the law of property treated the lease differently than a commercial contract. Importantly for this case, mitigation did not apply to a breach of a lease. Mitigation was a feature of contract law.

[23] In *Highway Properties*, the Supreme Court was considering a lease for retail space for use as a supermarket in a newly developed mall. The lease was for 15 years. Pursuant to the lease, the supermarket tenant covenanted to use the leased premises as a supermarket for the whole term of the lease. The mall was not successful. As the Court described it, the mall was a "ghost town." The supermarket tenant repudiated the lease. Unlike the case here, the landlord of the mall accepted the repudiation. The supermarket space was reconfigured and eventually rented out to two new tenants but at an amount less than what the supermarket tenant had agreed to pay. Unlike this case, the landlord effectively mitigated a portion of its loss, but not all of its loss.

[24] The issue in *Highway Properties* was essentially the reverse of the situation in this case. The issue was whether the landlord in *Highway Properties*, by re-entering the premises to reconfigure and lease the space to new tenants, had taken possession of the property such that it was then precluded from advancing any claim for the shortfall as between the supermarket's lease and the new tenants' leases. Traditional leasehold law would dictate that the landlord could no longer recoup the shortfall. Had the landlord wanted to recoup the amount owing on the lease, it was required to maintain the lease and sue as the rent came due.

[25] Laskin, J. (as he then was) set out the options of a landlord when the tenant sought to repudiate the lease. The key passage is as follows, at p. 570:

> The developed case law has recognized three mutually exclusive courses that a landlord may take where a tenant is in fundamental breach of the lease or has repudiated it entirely, as was the case here. **He may do nothing to alter the relationship of landlord and tenant, but simply insist on performance of the terms and sue for rent or damages on the footing that the lease remains in force.** Second, he may elect to terminate the lease, retaining of course the right to sue for rent accrued due, or for damages to the date of termination for previous breaches of covenant. Third, he may advise the tenant that he proposes to re-let the property on the tenant's account and enter into possession on that basis. Counsel for the appellant, in effect, suggests a fourth alternative, namely, that the landlord may elect to terminate the lease but with notice to the defaulting tenant that damages will be claimed on the footing of a present recovery of damages for losing the benefit of the lease over its unexpired term. One element of such damages would be, of course, the present value of the unpaid future rent for the unexpired period of the lease less the actual rental value of the premises for that period. [emphasis added]

[26] As is evident from this quote, Laskin J. provided several scenarios which may apply where a tenant is in "fundamental breach of the lease." It is the first scenario (bolded above) that is at issue in this case ("scenario one").

[27] However, in *Highway Properties*, the mall owner accepted the repudiation and mitigated by subdividing the supermarket premises and reletting the two new units to two new tenants. The scenario considered in *Highway Properties* was the third scenario, not the first. Laskin J. specifically said there was "no need to discuss either the first or second of the alternatives mentioned above": at p. 570.

[28] While the Court in *Highway Properties* was focused on the third scenario, it made comments on the general application of mitigation. Justice Laskin specifically commented there is no obligation on a landlord to mitigate if it kept the lease in good stead: at p. 573. Of course, in *Highway Properties,* the landlord took control of the premises and mitigation did occur.

[29] Justice Laskin went on to say it was no longer tenable to ignore the contractual element of a lease, particularly where the issue of remedies was concerned. In that regard, he said as follows at p. 576:

> It is no longer sensible to pretend that a commercial lease, such as the one before this Court, is simply a conveyance and not also a contract. It is equally untenable to persist in denying resort to the full armoury of remedies ordinarily available to redress repudiation of covenants, merely because the covenants may be associated with an estate in land. Finally, there is merit here as in other situations in avoiding

> multiplicity of actions that may otherwise be a concomitant of insistence that a landlord engages in instalment litigation against a repudiating tenant.

[30] The above passage was a significant break from prior case law. It recognised the contractual nature of the lease and held that the remedies ought not to differ simply due to the breach being of a contract "associated with an estate of land." There was also the practical consideration that if the lease was deemed to continue after an accepted repudiation, then the landlord would have to sue each time there was a non-payment.

[31] The Tenant argues that Laskin J.'s statement of scenario one is *obiter*, and therefore the doctrine of *stare decisis* does not apply. As such, it is suggested I am free to depart from the very specific language of *Highway Properties* that would dictate that the landlord need not mitigate. Rather, the Tenant argues I should apply the wider *ratio* in *Highway Properties* that contract principles ought to apply to leases, which would require mitigation.

[32] I accept Laskin. J.'s comments were *obiter* as it related to the facts in *Highway Properties.* However, some *obiter* from the Supreme Court of Canada is to be considered binding. In *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 57, the Supreme Court of Canada commented that some *obiter* must be regarded as authoritative whereas other *obiter* will only be persuasive:

> All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance, and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive but are certainly not "binding."

[33] Justice Rowe co-authored a paper where he commented as follows on the above quote:

> We offer the view, which we see in full accord with Henry, that to the extent a statement in a decision reflects the court's considered view of an area of law, it provides guidance that should be treated as binding. That is, where the Supreme Court turns its full attention to an issue and deals with it definitively, the concepts of ratio and obiter tend to lose significance. Similarly, where an issue is dealt with in passing, even where it is part of the ratio, we would see it as having weak precedential value. Often, when preparing reasons for decision, there is discussion not merely of what the court needs to decide in order to dispose of a given case, but of what further guidance can usefully be given with the case at hand as a vehicle for the purpose. Drawing the line between ratio and obiter is a key step in deciding whether an earlier decision applies to, and governs, the case at bar. From the foregoing, one can see that this requires careful attention to a series of considerations: see The Honourable Justice M. Rowe and L. Katz, "A Practical Guide to Stare Decisis" (2020) Windsor Review of Legal and Social Issues 41.

[34] In *Highway Properties*, Justice Laskin was setting out the law as it related to a repudiation of a lease and the duty of a landlord to mitigate its loss. Given the focus of the case, I do not see Justice Laskin's comments as being "in passing." Mitigation and the landlord's responsibility upon repudiation of a lease was the very issue in the case. In fact, Laskin J. relied upon *Goldhar v. Universal Sections & Mouldings Ltd.* (1963), 1 O.R. 189 (C.A.) in which the Ontario Court of Appeal cited an article which questioned the wisdom of scenario one, the very principle challenged here: C. McCormick, "The Rights of the landlord Upon Abandonment of the Premises by the Tenant" (1925) 23 Michigan Law Review 3. That article stated as follows, at pp. 221-222:

> No less certainly the logic, inescapable according to the standards of a "jurisprudence of conceptions", which permits the landlord to stand idly by the vacant, abandoned premises and treat them as the property of the tenant and recover full rent, will yield to the more realistic notions of social advantage which in other fields of the law have forbidden a recovery for damages which the plaintiff by reasonable efforts could have avoided.

[35] Justice Laskin was clearly alive to the issue being raised by the Tenant. His comments were not intended to pronounce a new principle but rather it was a statement of the law as understood by the Supreme Court of Canada, being its last pronouncement on the topic.

[36] However, if I am wrong, as a court of first instance, I am also bound by the decisions of the Ontario Court of Appeal and, on the basis of *comity*, I am also obliged to follow my fellow Superior Court judges who may have considered the issue: see *Fernandes v. Araujo*, 20115 ONCA 571, 127 O.R. (3d) 115, at para. 45.

[37] The Ontario Court of Appeal has considered *Highway Properties* in several contexts, but most addressed scenarios where the landlord did mitigate: see for example, *Toronto Housing Co. Ltd. et al. v. Postal Promotions Ltd*. (1982), 39 O.R. (2d) 627 (Ont. C.A.).

[38] In 1997, in a short endorsement in *Almad Investments Ltd. v. Mister Leonard Holdings Ltd.*, 1996 CanLII 412 (Ont. C.A.), the Court of Appeal was unequivocal that the duty to mitigate does not apply where a landlord continues to insist on the performance of the lease. In an endorsement in that case, the Court commented as follows:

> In this case the respondent landlord elected to do nothing to alter the relationship of landlord and tenant but simply insisted on performance of the terms of the lease and sued for rent on the footing that the lease remains in force. In these circumstances, the decision of the Supreme Court of Canada in *Highway Properties Limited v. Kelly Douglas & Co.* [cite omitted] confirms that the landlord has no duty to mitigate. Although the question of a duty on the landlord to mitigate has been the subject of comment, *Highway Properties* has not been overruled on this point. As the respondent pointed out, the appellant is still entitled to look for a new tenant and sublet the space.

[39] Given the unequivocal comments by the Court, there is little doubt that its opinion was that the law in Ontario, as affirmed in *Highway Properties*, is that a landlord is not required to accept the repudiation by the tenant and, if it keeps the lease in force, need not mitigate its losses. The brevity of the decision ought not to weigh against its precedential value: see *Bank of Montreal v. Iskenderov*, 2023 ONCA 528, at para. 67.

[40] The remedies discussion in *Highway Properties* was also considered by the Court of Appeal in *TNG Acquisition Inc. (Re)*, 2011 ONCA 535, 107 O.R. (3d) 304. In that case, after obtaining creditor protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, the tenant sent a letter to the landlord repudiating a commercial lease. The landlord never accepted the repudiation. The tenant abandoned the premises and was subsequently declared bankrupt. The landlord submitted a proof of claim to the trustee for its unrecoverable expenses during the entire term of the lease. The trustee issued a disclaimer of the lease and disallowed the bulk of the claim. In considering the landlord's claim for the total rent owing, Gillese J.A. commented on *Highway Properties:*

> [33] At p. 570 S.C.R. of *Highway Properties*, Laskin J. set out three courses of action that a landlord may take when a tenant has repudiated the lease entirely: (1) the landlord may insist on performance and sue for rent or damages on the footing that the lease remains in force; (2) the landlord may elect to terminate the lease, retaining the right to sue for rent accrued due or for damages to the date of termination for previous breaches of covenant; or (3) the landlord may advise the tenant that it proposes to re-let the property on the tenant's account and enter into possession on that basis.

[41] On a different point, at para. 40, Justice Gillese commented as follows:

> For the reasons given above, I would not accept this submission. The case law makes it clear that the landlord has an election to make when a tenant repudiates. The landlord must make the election in order for the parties to know what consequences flow from the repudiation. If the landlord does nothing, the landlord/tenant relationship remains and the lease continues in force.

[42] The comments by Gillese J.A. make it clear that the repudiation of the lease by a tenant does not end the matter. Rather, if the repudiation is not accepted, the lease continues, and mitigation is not required. In this sense, the *obiter* comments of Laskin, J. in *Highway Properties* were firmly adopted by the Ontario Court of Appeal.

[43] I should add that judges of the Superior Court have consistently applied the principle that a landlord who does not accept a repudiation may insist on the lease being performed and need not mitigate: see for example, *Glenview Management Lid. v. Axyn Corp*, 2003 CanLII 2581 (Ont. S.C.); *607190 Ontario Inc. v. First Consolidated* (1992), 60 O.A.C. (Gen. Div.). In *Daniels CCW Corporation v. Shevchuk*, 2023 ONSC 2955, at para.47, Justice Perell recently described the state of the law as follows:

> In the context of landlord and tenant law, the point of when, if at all, a landlord must accept a termination and mitigate, rarely arises because most defaulting tenants have no financial means to pay accruing rent and so there is no advantage to the landlord in keeping the lease alive. The point, however, has arisen in some cases and the courts have consistently held that the landlord's choices are mutually exclusive and there is no duty to mitigate if the landlord chooses to keep the lease alive. This caselaw forecloses the tenant's argument that the Landlord in the immediate case ought to have accepted the repudiation of the lease and begun exercising its obligation to mitigate at some point in time before it issued its Kelly Douglas Notice.

[44] I find that the law of Ontario as set out in the above appellate authority is that the landlord need not accept repudiation and may insist on the performance of the lease. If so, the landlord has no duty to mitigate. This principle is binding on this Court, subject to the Tenant persuading me that I ought to depart from this precedent.

The Tenant's Case for Change

[45] The Tenant argues if that is the law, I ought to reject it and impose a duty to mitigate. It is argued that:

> (a) imposing a duty to mitigate avoids economic waste and ensures economic efficiency;
>
> (b) imposing a duty to mitigate harmonizes the law of commercial leases with almost all other areas of law;
>
> (c) imposing a duty to mitigate recognizes that the landlord is usually in a much better position to mitigate damages than the tenant;
>
> (d) failing to impose a duty to mitigate results in, and arguably encourages, absurd outcomes;
>
> (e) imposing a duty to mitigate reduces the risk of "litigation by instalment"; and
>
> (f) imposing a duty to mitigate preserves and promotes freedom of contract.

[46] The Tenant submits that this "incremental change" is warranted on the basis that the law of mitigation and the law of contract have evolved since 1971.

[47] On the issue of mitigation, Tenant's counsel says it is now an anomaly that a contract involving a commercial lease does not require mitigation. The Tenant cites *Asamera Oil Corporation Ltd. v. Sea Oil & General Corporation et al*. (1978), [1979] 1 S.C.R. 633; *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415; *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74; and *Southcott Estates Inc. v. Toronto Catholic District School Board*,

2012 SCC 15, [2012] 2 S.C.R. 675 as being cases that have modified the law on mitigation since *Highway Properties*.

[48] The commonly accepted definition of mitigation in contract cases comes from Chief Justice Laskin in *Red Deer College v. Michaels* (1975), [1976] 2 S.C.R. 324, just four years after *Highway Properties*, where he stated at p. 330-331:

> The primary rule in breach of contract cases, that a wronged plaintiff is entitled to be put in as good a position as he would have been in if there had been proper performance by the defendant, is subject to the qualification that the defendant cannot be called upon to pay for avoidable losses which would result in an increase in the quantum of damages payable to the plaintiff. The reference in the case law to a "duty" to mitigate should be understood in this sense.
>
> In short, a wronged plaintiff is entitled to recover damages for the losses he has suffered but the extent of those losses may depend on whether he has taken reasonable steps to avoid their unreasonable accumulation.

[49] In *Asamera Oil*, the plaintiff asserted that it was entitled to specific performance on a contract for the sale of shares and that it had no duty to mitigate. There was no authority for the proposition that mitigation was not required. Early English cases addressing damages for the withholding of shares were rejected as they were decided long before the “modern principles of contractual remedies” and the current case law of the court. The Court recognised that the law of contract required mitigation and the old exceptions regarding proprietary rights for shares ought to no longer apply.

[50] In *Semelhago*, the Court addressed the principle of specific performance of a real estate transaction. It had been the law that when a vendor of property reneges on a potential sale, the innocent purchaser had two options. The purchaser may accept the repudiation and treat the agreement as being at an end and, in such cases, both parties need not perform any outstanding obligations under the contract and the purchaser may sue for damages. Alternatively, the injured party may decline to accept the repudiation and insist on specific performance. Specific performance was an accepted remedy for failed real estate transactions. However, the Court rejected this convention and said that there was no reason damages would ordinarily be inadequate. Building on *Asamera*, Sopinka J. said at para. 21 as follows:

> It is no longer appropriate, therefore, to maintain a distinction in the approach to specific performance as between realty and personalty. It cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases.

[51] In *Forest Products*, the Court reviewed the development of mitigation in tort claims. Justice Binnie found that there are two principles that underline the requirement to mitigate: “a plaintiff should not recover for a loss that he could reasonably have avoided, and the defendant should not

be forced to pay the plaintiff where the plaintiff has been wasteful after the fact of the wrongdoing": at p. 153.

[52] In *Southcott*, the Supreme Court considered the doctrine of mitigation in relation to a single purpose corporation, with no assets other than money advanced from the parent, which suffers a loss. In that case, the plaintiff was deprived of property which was subject to a potential development. Again, the Court considered when specific performance would excuse the plaintiff from mitigating the loss. Justice Karakatsanis held that there will always be a duty to mitigate but the request for specific performance will be considered when considering if the refusal to purchase a substitute property was reasonable. The Court found that a plaintiff deprived of an investment property does not have a "fair, real, and substantial justification," or a "substantial and legitimate" interest in specific performance unless the plaintiff can show the money would be an inadequate remedy because the property was of a peculiar or special value to it: at para. 41.

[53] The Tenant points to the above cases as demonstrating a long and consistent juridical path since *Highway Properties* endorsing the principle of mitigation where a plaintiff seeks damages in the commercial context. The Tenant also points to recent cases that have developed in the law of contract. It is suggested that mitigation is a doctrine which ought to be included as part of the organizing principle of good faith contractual performance. In this regard, the Tenant relies on *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, which found that the organizing principle of good faith manifests itself into other more specific legal doctrines. As described by the Supreme Court: "the organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interest of the contracting party": at para. 65. It is asserted that the duty of good faith has given rise to new contractual duties. The Court described the need for a good faith doctrine as an incremental step needed to "make the common law less unsettled and piecemeal, more coherent and just": at para. 33. The Tenant dovetails this argument with the Quebec Civil Code which imposes a duty to mitigate on commercial landlords as a matter of good faith. Of course, that is a duty imposed by legislative action and not the common law. Nonetheless, it is asserted that now that good faith contractual performance has been acknowledged, the Quebec Civil Code provides an illustration as to how it ought to apply in the context of a commercial lease.

[54] It was thought by some that the *dicta* in *Highway Properties* would usher in a new era where contract principles would prevail over property law principles. Indeed, the Tenant produced several articles where authors push for the continued "contractualization" of property law based on the promise shown in *Highway Property*. In *Keneric Tractor Sales Ltd. v. Langille*, [1987] 2 S.C.R. 440, one of the few Supreme Court of Canada cases to consider *Highway Properties*, the Court addressed whether contractual damage principles ought to apply to a leasehold of chattels and whether the reasoning in *Highway Propertie*s should be extended to cover leases of chattels. In considering the issue, the Court in *Keneric* found *Highway Properties* had shifted the jurisprudential foundation "that the previous case law was based upon": at p. 450. The Supreme Court held that there was no longer any basis for treating a chattel lease different from a lease of property. Similar to *Highway Properties*, the lessor had retaken possession of the leased chattel and sold it at a loss.

Up to this point, the law of property would deny the lessor the right to sue for the shortfall as it had taken possession of the chattel.

[55] Justice Wilson noted that *Highway Properties* followed the Australian case law which held that the leasehold law created “artificial barriers” in relation to the recovery of damages by the landlord upon the surrender of a lease by the tenant. She then commented as follows at pp.452-453:

> The Court in *Highway Properties* justified its decision by an appeal to both principle and practicality. In principle it made no sense to regard a commercial lease of land as "simply a conveyance and not a contract". **This historical anomaly could only be corrected by assessing damages in breach of land lease cases on general contract principles**. Practicality supported the change as well since the new approach avoided the potential for multiplicity of actions inherent in the old approach. Both these factors suggest that the same change should be made in the law applicable to breaches of chattel leases. [emphasis added]

[56] Justice Wilson further pointed out that damages from a breach of a chattel lease should, like a breach of a land lease after *Highway Properties*, follow a breach of contract analysis: at para. 453.

[57] Elsewhere in *Keneric*, Justice Wilson applied contract rather than property principles to address the leasehold rights upon repudiation, at p. 454:

> Repudiation may be triggered by either the inability or the unwillingness of a party to perform his contractual obligations. The same is true of a breach of contract that gives rise to a right to terminate; it may be the result of inability or unwillingness to perform. The breach and the repudiation are merely subdivisions within a general category of conduct, i.e., conduct which gives the innocent party the right to treat the contract as terminated. Thus, there is no conceptual difference between a breach of contract that gives the innocent party the right to terminate and the repudiation of a contract so as to justify a different assessment of damages when termination flows from the former rather than the latter. General contract principles should be applied in both instances.

[58] Consistency with *Highway Properties* and Justice Laskin’s comments about the applicability of contract principles was central to the finding in *Keneric*. However, the comment by Justice Laskin regarding scenario one, that a landlord “may do nothing to alter the relationship of landlord and tenant, but simply insist on performance of the terms and sue for rent or damages on the footing that the lease remains in force,” was not subject to direct comment by the Supreme Court in *Keneric*. *Keneric* has not been subject to further comment by the Supreme Court, other than once on an issue not germane to this case: see *Guarantee Co. of North America v. Gordon Capital Corp*., [1999] 3 S.C.R. 423.

[59] The ascendancy of the contractual principles in the area of property law as set out in *Highway Properties* was also subject to positive comment in the House of Lords. Mitigation was not the only contractual concept that was foreign to leasehold law. In 1981, in *National Carriers Ltd. v. Panalpina (Northern) Ltd.*, [1981] 1 All E.R. 181 (H.L.), the House of Lords considered whether the doctrine of frustration (a doctrine of "comparatively recent development") ought to apply to a leasehold. In that case, a closure of a road made the leased premises useless for the tenant's purposes. Frustration was a contractual doctrine, which historically did not apply to leaseholds which, as noted earlier, were characterized as conveyances.

[60] Lord Wilberforce cited several reasons why the law of frustration ought to apply. Among those reasons, he cited *Highway Properties* as a case of perceiving leaseholds as not just conveyances but as contracts. He applied the rational in *Highway Properties* in holding the doctrine of frustration ought to apply to leases.

[61] Finally, this is not the first attempt at revisiting *Highway Properties.* In Ontario, with one exception, attempts to revisit *Highway Properties* have failed. In *Globe Convestra Ltd. v. Vucetic* (1990), 15 R.P.R. (2d) 220 (Ont. Gen. Div.), Justice Taliano reviewed *Highway Properties* and found scenario one did not fit easily with the rest of the decision and that *Asamera Oil* articulated a strong policy statement for mitigation. As stated by the Court, "it is difficult to accept, in this day and age, the continuing accuracy of a proposition that permits a landlord to sit back and do nothing to mitigate a loss occasioned by a forfeiting fitting tenant": at pp. 33-34. However, this case is not consistent with the rest of the jurisprudence in Ontario and, according to counsel, this case has not been considered by any other courts.

[62] There have been several cases in other provinces, particularly Alberta and British Columbia where those courts have addressed the argument that *Highway Propertie*s ought to be revisited. The Alberta cases are from the King's Bench: see *Panther Sports Medicine and Rehabilitation Centres Inc. v. Adrian G Anderton Professional Corporation*, 2019 ABQB 973 and *1218807 Alberta Ltd v. Muslim Association of Canada Ltd*, 2023 ABKB 300. In *Panther*, Justice Wooley was persuaded that the movement in the case law since *Highway Properties*, particularly in *Southcott*, warranted a landlord having a duty to mitigate but did not conclusively decide the matter. That decision was picked up in in *Muslim Association* where Angotti J. stated at para. 188:

> I find that it was unreasonable for the Landlord not to further explore the offer of MAC. The relationship was not untenable. The offer would make the Landlord whole for the remaining term of the contract, while allowing the Landlord to continue to pursue its claim for damages arising prior to entering into a new lease. The Landlord knew that it would be very difficult, based on the history of the Premises, to obtain any alternative offer to lease or sell the Premises. I share the concern expressed by Justice Woolley in Panther at para 63: "I am troubled by the idea that the law would permit a landlord to sit back and allow losses to accumulate, when the landlord through reasonable steps could avoid them." It would be unreasonable for the Landlord not to engage in this offer, which would significantly reduce the losses it was claiming.

[63] The reasoning in *Panther* was soundly rejected by the British Columbia Court of Appeal in *Anthem Crestpoint Tillicum Holdings Ltd. v. Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI,* 2022 BCCA 166. The Court of Appeal did not accept that *Southcott* had changed the law in respect of an action for damages "where mitigation is generally required, and an action to recover debt, where it is not": at para. 81.

[64] I am not bound by the British Columbia Court of Appeal or the Alberta Court of King's Bench. I am subject to vertical *stare decis*is when considering decisions of the Supreme Court of Canada or Ontario Court of Appeal and, horizontal *stare decisi*s in respect of the Ontario Superior Court. As such, I turn to the doctrine of *stare decisis* and its application to this case.

Stare Decisis

[65] The doctrine of *stare decisis* is a fundamental organizing principle of the common law. It promotes consistency and predictability in the law. With predictability and consistency, people can organize their affairs knowing how their actions would be interpreted by the courts based on prior precedents. In recent years, particularly post-*Charter*, cases have emerged that appear to allow for the courts to review precedent based on a changing social and legal landscape. It is this case law that the Tenant relies upon to submit that I ought to depart from the clear statement in *Highway Properties.*

[66] There are two forms of *stare decisis,* vertical *stare decisis* and horizontal *stare decisis.* The former applies where a lower court is asked to depart from a higher court's ruling. In this case, I am asked to depart from the Supreme Court of Canada's decision in *Highway Properties.* Even if the passage of concern is *dicta,* rather than a statement of the law, the Court of Appeal has clearly adopted the principle in issue and I am bound to follow those cases. Horizontal *stare decisis* applies as a matter of comity between judges of the same court. In those circumstances a judge from one court ought not to deviate from a principle applied by a judge of the same court, assuming the case is not distinguishable: see *Hansard Spruce Mills (Re),* [1954] 4 D.L.R. 590 (B.C.S.C.), for the exceptions that apply. Horizontal s*tare decisis* may also refer to when a court, such as the Supreme Court of Canada, departs from its own prior precedent: see *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 39, and larger discussion in the concurring opinion in *R. v. Kirkpatrick*, 2022 SCC 33, 471 D.L.R. (4th) 440.

[67] In this case, the Tenant cites *Bedford* , *Carter v. Canada (Attorney General*), 2015 SCC 5, [2015] 1 S.C.R. 331 and, *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342 for the proposition that "courts of first instance are empowered to reconsider established precedent (here, *Highway Properties* and the cases that have relied on it), if 'new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate' " (quoting from *Bedford* at para 42).

[68] Each of *Bedford*, *Carter* and *Comeau* were *Charter* cases. Each time, the Supreme Court cautioned that the threshold for revisiting a vertical precedent is "not an easy one": *Bedford* at para. 44.

[69] In *R. v. Comeau*, the most recent of the three cases (but not the most recent pronouncement by the Court), the Supreme Court reiterated the importance of vertical *stare decisis* and how hard it is for a lower court to meet the test to deviate from prior precedent. The Court held that "subject to extraordinary exceptions, a lower court must apply the decision of higher courts to the facts before it": at para. 26. In that case, it was argued that the evidentiary basis demonstrated a significant shift in the foundational legislative and social facts. Such a change is not simply a matter of opinion but rather the change must arise from a "fundamental shift" in how jurists understand the legal question at issue.

[70] Each of the above cases addressed the development of case law under the *Charter*. Given both the *Charter*'s constitutional prominence and its living tree ethos, it is not surprising that those cases generate precedent for lower courts revisiting prior case law. However, the Supreme Court is not inviting lower courts to deviate from prior precedent simply because the lower court believes it has a better solution to the legal and factual issue at hand. The test is onerous and must account for "the need for finality and stability": *Bedford* at para 44.

[71] Since *Bedford*, *Carter,* and *Comeau*, the Supreme Court has considered horizontal *stare decisis* when faced with cases challenging its own precedent. In *R. v. Kirkpatrick*, 2022 SCC 23, 471 D.L.R. (4th) 440, a concurring minority discussed at some length when the Court could deviate from a prior precedent. In providing a predictable and equally applied standard, *stare decisis* promotes the rule of law which, in turn, promotes public confidence and legitimacy in the judiciary and their role in society. The Court went on to discuss the circumstances when it would overturn its own decisions. It was said to be hard to define when incremental legal change is required. As stated by the concurring minority: "that said, given the institutional limitations of the courts with respect to public policy, they should be inclined to change the common law only incrementally": at para. 264. But where incremental change is said to be appropriate, the case law would ordinarily identify a common theme that reveals a precedent requires an incremental change. The Court in *R. v. Kirkpatrick* was speaking of horizontal change at the Supreme Court yet, a lower court has far less scope to deviate from vertical precedent: see also *R. v. Sullivan,* 2022 SCC 19, 472 D.L.R. (4th) 521.

[72] In *Black v. Owen*, 2017 ONCA 397, the Ontario Court of Appeal addressed *Bedford* and *Carter* and pointed out the distinction between *Charter* cases and non-*Charter* cases. The Court rejected the notion that the legal principles underlying the earlier authority, some 15 years previous, had changed, even though English case law differed with the governing Ontario authority. In such circumstances, the Court stated at para 46:

> To summarize, in a case like this one, a judge of a lower court may not decline to follow a binding precedent of a higher court on the ground that he or she disagrees with it or because, in his or her view, it appears to have been overtaken by subsequent decisions of a lower court in the same jurisdiction, or by jurisprudential developments in another jurisdiction.

[73] In *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd*., [1997] 3 SCR 1210, the Supreme Court extended the concept of contributory negligence to marine law cases. In that case, the bar on contributory negligence in this one area of the law was seen as out of step with the concepts of fairness and justice. The court commented at para. 93 as follows:

> The question is whether the proposed change falls within the test for judicial reform of the law which has been developed by this Court. Courts may change the law by extending existing principles to new areas of the law where the change is clearly necessary to keep the law in step with the "dynamic and evolving fabric of our society" and the ramifications of the change are not incapable of assessment. Conversely, courts will not intervene where the proposed changes will have complex and far-reaching effects, setting the law on an unknown course whose ramifications cannot be accurately gauged…

[74] Like the law of leaseholds, there had been common law developments in marine law such that there had been judicial reform in the past. The Court held that it was appropriate to extend the concept of contributory negligence to marine law cases. In doing so, the Court considered the consequence of lifting the bar. The Court "confidently predicted that lifting the bar will not produce unforeseen or problematic consequences": at para. 97. It should be noted that the judge of first instance followed the conventional law that barred contributory negligence in marine claims.

[75] *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, which predates *Bedford* by one year, may be the most apt authority. *Craig* involved the common law application of *stare decisis* in a non-Charter setting. The Federal Court of Appeal had modified a Supreme Court ruling on a tax principle. In a subsequent case, the Tax Court and Federal Court of Appeal were faced with competing precedent. The issue arose whether the courts were obligated to apply the initial decision of the Supreme Court of Canada or the decision of the Federal Court of Appeal. The Court acknowledged the prior precedent had its detractors, including academics. However, the Court stated clearly that the Federal Court of Appeal ought to have left it to the Supreme Court to rectify the issue. Rothstein J. said that the lower court ought not to have deviated from the Supreme Court's earlier decision as it created uncertainty in the law. Rather, they ought to have applied the earlier precedent and provided reasons why the precedent was "problematic…rather than purporting to override it": at para. 21.

[76] As stated at the outset, the Tenant has made a big ask.

Application of *Stare Decisis*

[77] The Tenant's argument rests on whether the law of mitigation and contract have evolved such that requiring the Landlord to mitigate may be considered an "incremental change" in the law and, if so, whether this court may deviate from the clear direction of *Highway Properties*.

[78] I accept that the law of mitigation and contract has evolved over the years. I also accept, as evident from *Highway Properties*, judicial reform has taken place in the area of mitigation as it relates to leaseholds. Further, it does appear anomalous that a commercial landlord, at its sole discretion, does not have an obligation to mitigate upon repudiation by the tenant.

[79] While leaseholds convey a property interest, it was not made clear to me why a duty to mitigate would do violence to the relationship between landlord and tenant, particularly where, as here, the relationship is governed by a contract spelling out the parties' duties and obligations. In addition, Laskin J.'s comment that litigation by installment is highly inefficient applies equally to scenario one. Here, the plaintiff seeks rent accrued and owing to date and will need to obtain orders as further rent becomes due in the next 4 ½ years. If upon repudiation of the lease, the landlord's entitlement converted to a chose in action, the landlord would sue for all its damages, subject to its mitigation efforts. Such damages would include the present value of any loss of rent which could not be avoided by reasonable efforts by the landlord and the costs of such mitigation efforts. In this way, there would be one lawsuit.

[80] It was argued that landlords invest a great deal in their properties and that they need to be able to rely on the predictable rent for financing. However, this is not unique. Leasing companies rely on lease payments to finance their business and equipment debt. Yet, following *Keneric*, there is a duty to mitigate on the lessor. Requiring a landlord to mitigate would promote economic efficiency which is a goal of mitigation and contract law: see *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 S.C.R. 661, at para. 97. In this case, the Premises sits idle while the Landlord holds steadfast in not leasing the Premises. In addition, mitigation would also promote efficient breaches whereby both sides can part ways while ensuring the plaintiff receives damages for any short fall from reletting and the tenant can move on to a more productive office space: see *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601 and *Farwell v. Citair, Inc.* (*General Coach Canada*), 2014 ONCA 1, 17 C.C.E.L. (4th) 329. As such, I have some sympathy for the Tenant's argument. However, as discussed below, I am not satisfied that what is proposed is an incremental change that ought to be made by a judge at first instance. My comments in sympathy for the Tenant's arguments are made in furtherance of Justice Rothstein's suggestion in *Craig* that lower courts may point out perceived problems where *stare decisis* precludes the rejection of a prior precedent.

[81] The change proposed by the Tenant would fundamentally alter the remedies available to a landlord. This is not an insignificant change even if it is predicated on case law that has developed over the years. The Supreme Court has made it clear that a lower court rejecting a precedent is an exceptional exercise of judicial power. Before doing so, a lower court must look beyond the case at hand to determine the impact of such a change, including how people govern themselves. For over fifty years, commercial landlords and tenants have entered into relationships on the basis of the principles set out in *Highway Properties.* Tenants have undoubtedly entered these contracts knowing that if the tenant repudiates the lease, the landlord may insist on performance and need not mitigate any avoidable losses. These bargains between landlords and tenants implicitly recognise that commercial landlords have this unique remedy. The proposed "incremental change" could have a dramatic impact on bargains already made. This is not to say a higher court might not

decide to revisit *Highway Properties* as the Supreme Court has done in other circumstances. However, a single judgment by a judge of first instance rejecting the principle in *Highway Properties* would cause uncertainty in the law and instability in the marketplace. It would undermine the certainty and predictability at the heart of the doctrine of *stare decisis*.

[82] For the reasons stated, I am not prepared to deviate from *Highway Properties*.

[83] As such, subject to the argument regarding s. 19.03 of the Lease, the Tenant is in breach of the Lease and there is no duty on the Landlord to mitigate as it has continued to treat the Lease as operable.

Section 19.03 of the Lease

[84] The Tenant argues that the Lease caps any damages after default at two years' Rent. The Landlord asserts that the Tenant is misinterpreting the Lease.

[85] The leading case on contractual interpretation is *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, which holds at para. 47 that to determine the intentions of the parties, a contract must be read in accordance with the following principles:

> (a) the contract must be read as a whole;
> (b) the words of the contract must be given their ordinary and grammatical meaning; and
> (c) the contract and words must be read considering the surrounding circumstances (sometimes called the "factual matrix") known to the parties at the time of contract formation.

While I am allowed to consider the factual matrix surrounding the formation of the contract, there was no specific evidence filed and no argument made by either side as to the factual matrix giving rise to the formation of the Lease. Simply said, the context is that this was an arms-length commercial lease negotiated by two sophisticated parties.

[86] In interpreting s 19.03 of the Lease, I must have regard to the plain meaning of the words used by the parties. It is those words, informed by the factual matrix, that reveal the intention of the parties. However, the Lease is more than one isolated provision. Any one provision of the Lease must be interpreted with consideration of the other relevant provisions of the Lease. The words used must be interpreted in a way so as to give effect to the whole Lease , not just the words under consideration. In doing so, the court is to avoid an interpretation of one term that would render another term of the Lease as ineffective. It is assumed that the Lease was intended to make good commercial sense. In this case, particular regard must be had to the common law rights of the parties that would prevail in the absence of the Lease. The Ontario Court of Appeal in *Salah v. Timothy's Coffees of the World Inc.*, [2010] O.J. No. 4336, 2010 ONCA 673 described the general exercise of contractual interpretation as follows at para. 16:

> The basic principles of commercial contractual interpretation may be summarized as follows. When interpreting a contract, the court aims to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said. The court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective. In interpreting the contract, the court must have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties. The court should interpret the contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity. If the court finds that the contract is ambiguous, it may then resort to extrinsic evidence to clear up the ambiguity.

[87] I will turn to the Lease, with the intent of interpreting the Lease as a whole, having regard to the direction in *Salah*.

[88] As discussed, the Tenant provided a notice of repudiation followed by three payments of rent. The Landlord took the view, as it was entitled to do, that the Lease remained in effect and that after cashing the last of the three payments, the Tenant was in default of the Lease.

[89] Section 19.03 addresses defaults and reads as follows:

> If and whenever:
>
> (a) the Rent hereby reserved is not paid in full when due, and such default continues for seven (7) days after the due date;
>
> [other terms of Default omitted]
>
> then and in any of such events, the full amount of the current month's and the next ensuing three (3) months' installments of Rent shall immediately become due and payable and Landlord may immediately distrain for the same, together with any arrears then unpaid and at the option of Landlord, Landlord may terminate this Lease by giving notice thereof, and Landlord may re-enter the Premises and may expel all persons and remove all property from the Premises and such property may be removed and sold or disposed of by Landlord as it deems advisable or may be stored in a public warehouse or elsewhere at the cost of Tenant without Landlord being considered guilty of trespass or conversion or becoming liable for any loss or damage which may be occasioned thereby, provided, however, that such termination shall be wholly without prejudice to the right of Landlord to recover arrears of Rent and damages for any default by Tenant hereunder. Should Landlord at any time terminate this Lease by reason of any such event, then, in addition to any other remedies it may have, it may recover from Tenant all damages it may incur as a result of such termination. **Notwithstanding anything in this Lease to**

> **the contrary, in no event shall Tenant be liable for (i) any consequential damages or (ii) lost Annual Rent in excess of two (2) years of Annual Rent falling due immediately following the** default**.** If Landlord re-enters and terminates this Lease and Tenant fails to remove its property within ten (10) days after notice requiring it to do so is given, Tenant will be deemed to have abandoned its property and Landlord will be entitled to retain it or dispose of it for Landlord's benefit. [emphasis added]

[90] The Tenant argues that the intent of the statement in section 19.03 that "in no event shall Tenant be liable for (i) any consequential damages or (ii) lost Annual Rent in excess of two (2) years of Annual Rent falling due immediately following the default" is to cap the Tenant's liability to any amount owing two years from the date of default. The Landlord argues that the provision is not referring to arrears of rent, which it says is the nature of its claim.

[91] The Lease provides that the Landlord's remedies are cumulative:

> 19.06 Remedies Cumulative
>
> No reference to or exercise of any specific right or remedy by Landlord shall prejudice or preclude Landlord from exercising or invoking any other remedy in respect thereof, whether allowed at law or in equity or expressly provided for herein. No such remedy shall be exclusive or dependent upon any other such remedy, but Landlord may from time to time exercise any one or more of such remedies independently or in combination.

[92] The Lease further provides that there will be no implied surrender or waiver and that the Landlord will be able to recover the balance of the Rent owing:

> 20.10 No Implied Surrender or Waiver
>
> No provision of this Lease shall be deemed to have been waived by Landlord unless such waiver is in writing signed by Landlord. Landlord's waiver of a breach shall not prevent a subsequent act, which would have originally constituted a breach, from having all the force and effect of any original breach. Landlord's receipt of Rent with knowledge of a breach shall not be deemed a waiver of any breach. Landlord's failure to enforce against Tenant or any other tenant in the Building any of the Rules and Regulations shall not be deemed a waiver thereof. Nothing done by Landlord shall be deemed to be an acceptance of a surrender of the Premises, and no agreement to accept a surrender of the Premises shall be valid, unless in writing signed by Landlord. The delivery of keys by Tenant to any of Landlord's agents or employees shall not operate as a termination of this Lease or a surrender of the Premises. No payment by Tenant, or receipt by Landlord, of a lesser amount than the Rent due hereunder shall be deemed to be other than on account of the earliest stipulated Rent, nor shall any endorsement or statement on any cheque or

> any letter accompanying any cheque, or payment as Rent, be deemed an accord and satisfaction, and Landlord may accept such cheque or payment without prejudice to Landlord's right to recover the balance of such Rent or to pursue any other remedy available to Landlord.

[93] Further, the Lease provides no unilateral right to terminate by the Tenant but does speak to the Landlord's right to insist on performance in s. 12.04:

> Survival of Obligations
>
> If Tenant has failed to perform any of its obligations under this Lease, such obligations, and the rights of Landlord in respect thereto shall survive the expiration or other termination of the Term.

[94] Section 19.03 speaks to defaults by the Tenant and the right of the Landlord to terminate. No right of termination is provided to the Tenant. This is consistent with scenario three in *Highway Properties*. What follows in s. 19.03 is a description of what the Landlord may do in such circumstances including distraining and seeking payment of monies owing. The specific sentence starting with "Notwithstanding" in s. 19.03, relied upon by the Tenant, must be read in context, both as to its position in the paragraph and the agreement as a whole. The prior sentence in the paragraph references the termination of the Lease by the Landlord – "Should the landlord at any time terminate the lease." It is in the context of the Landlord terminating the Lease for default that the "Notwithstanding" sentence applies. If the Landlord terminates the Lease, the Tenant is not obligated to pay consequential damages and no more than two years of Annual Rent. The "Notwithstanding" sentence caps the damages in that scenario to two years.

[95] However, in this case, the Landlord did not terminate. Rather, it kept the Lease alive after the Tenant's default. Not only is that right preserved by *Highway Properties*, but it is supported by the other provisions of the Lease such as "No Implied Surrender or Waiver", "Survival of Obligations", and "Cumulative Remedies." The intent of these sections was to avoid any implied conduct by the Landlord, such as surrender by operation of law or waiver, that would void its entitlement to the full panoply of contractual or common law remedies. In my view, sections 12.04, 19.06 and 20.10 when read together were intended, to preserve the Landlord's rights under the lease so as to treat the Lease as continuing in the face of a Tenant's default where the Landlord does not terminate. In my view, it would be inconsistent with the rest of the contract provisions if s. 19.03 were interpreted as capping the Landlord's entitlement to two years where the Landlord does not take steps to terminate the Lease. Moreover, it would not make commercial sense for the Lease to limit the Landlord's remedies, without expressly saying so in the Lease. In my view, there is no express or even implied limitation on the Landlord's right to invoke scenario one in the Lease.

[96] Reading the Lease as a whole and the plain wording of s. 19.03, I do not accept that the provision limits the damages where there has been no termination of the Lease. Therefore, there is no limitation of the rent owing by the Tenant to the Landlord.

Disposition

[97] The plaintiff is entitled to a damage award of $638,171.40 being the rent up to June 15, 2023.

[98] The plaintiff is entitled to interest on all unpaid amounts at the rate of five (5) percentage points above the prime rate per annum as stipulated in sections 19.01 and 1.01(m) of the Lease. If there is any issue as to the application of interest, I may be spoken to by the parties.

[99] The plaintiff has asked that the Tenant be ordered to pay all future Rent as it becomes due. I decline to do so. The Landlord still has an obligation to account for any mitigation that might in fact take place. It is very possible that the Landlord will, in the future, relet some or all of the Premises. In such circumstances, the full Rent would not be owing. What will be owing by the Tenant will need to be assessed having regard to any mitigation that takes place. As noted in *Highway Properties*, this may necessitate a further action by the Landlord.

[100] I dismiss the counterclaim.

Costs

[101] I encourage the parties to agree on costs. If they cannot, I will receive costs submissions as follows:

a. Any party claiming costs shall file written submissions of no more than six pages, plus a bill of costs and any offers to settle, by January 8, 2024.

b. Any responding submissions shall be limited to five pages, plus a bill of costs and any written offers to settle and shall be delivered by January 23, 2024.

c. Any reply to submissions shall be delivered by January 26, 2024 and shall be no more than one page in length.

d. All submissions shall be uploaded to CaseLines and delivered to me by way of email to my assistant from whom you received this decision.

[102] Finally, I would like to thank counsel for their preparation and presentation of this matter.

Callaghan, J.

Released: December 12, 2023

CITATION: The Canada Life Assurance Company et al. v. Aphria Inc., 2023 ONSC 6912
COURT FILE NO.: CV-22-00682888-0000
DATE: 20231212

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

THE CANADA LIFE ASSURANCE COMPANY, LG INVESTMENT MANAGEMENT, LTD. as trustee for IG MACKENZIE REL PROPERTY FUND and OPTRUST OFFICE INC.

Applicant/Defendants to the Counterclaim

– and –

APHRIA INC.

Defendant/ Plaintiffs by Counterclaim

REASONS FOR JUDGMENT

Callaghan J.

Released: December 12, 2023