CITATION: Extreme Toronto Sports Club v. Razor Management Inc., 2024 ONSC 2707
COURT FILE NO.: CV-21-00659703-0000
DATE: 20240510

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: EXTREME TORONTO SPORTS CLUB, Plaintiff (Responding Party)

AND:

RAZOR MANAGEMENT INC., MATTHEW RAIZENNE
AND 2699677 ONTARIO INC. c.o.b. STADIUM SPORTS LEAGUES,
Defendant (Moving Party)

BEFORE: L. Brownstone J.

COUNSEL: *Adam J. Pyne-Hilton*, for the Defendant Moving Party

Philip Kennedy and Christine Gorgi, for the Plaintiff Responding Party

HEARD: March 5, 2024

ENDORSEMENT

Introduction

[1] The defendant Razor Management Inc. ("Razor") or its predecessor corporation held license or lease agreements for three sports fields annexed to Toronto schools ("the facilities"). In turn, Razor entered into license agreements with various entities for the use of those facilities at specific times. Three such license agreements were entered into between Razor or its predecessor corporation[1] and the plaintiff Extreme Toronto Sports Club ("XTSC"). XTSC used the facilities to run recreational adult competitive sports leagues.

[2] After the COVID-19 pandemic was declared in March 2020, there were periods of time during which the facilities were not permitted to be used at all, and periods during which they could be used in restricted ways. The federal government offered various forms of subsidies for rent relief. Razor and XTSC came to an agreement for the first period of closure, from March to August 2020 ("the pandemic-related agreement"). However, they did not reach an agreement during subsequent periods of shutdown or restricted use. XTSC claims it was relieved of its payment obligations under the license agreements because Razor could not make the facilities available for XTSC's use, which Razor was required to do under the terms of the license

[1] For ease of reference, I will refer to the licensor in all three agreements as Razor.

agreements. XTSC makes its claim based on the principles of contractual interpretation; it does not rely upon frustration of contract or *force majeure*. Razor claims XTSC was required to pay for its allocated time under the agreements regardless of whether it did use, or was able to use, the licensed premises.

[3] In February 2021, Razor terminated the license agreements for XTSC's failure to pay arrears owing. Shortly thereafter, XTSC started a claim for damages against the defendants Razor and Matthew Raizenne for net revenues lost due to wrongful termination and related breaches of the three license agreements, damages under the pandemic-related agreement, and exemplary damages. XTSC also sought a disgorgement of profits from Razor and 2699677 Ontario Inc., carrying on business as Stadium Sports Leagues ("SSL"), based on its claim that they were unjustly enriched by the termination of the license agreements. The defendant Razor counterclaimed for damages for rental arrears and lost rent.

[4] Razor moves against XTSC for summary judgment on its counterclaim for arrears owing under the three license agreements. All three defendants move for summary judgment dismissing XTSC's claim.

[5] The parties have agreed for purposes of the counterclaim that, if arrears are found to be owing by XTSC, they amount to $338,984.20 plus HST. The parties have also agreed that summary judgment is an appropriate procedure for determining Razor's counterclaim, and that if Razor succeeds on summary judgment on the counterclaim, the three defendants should also succeed on summary judgment dismissing the action.

[6] For the reasons that follow, I grant Razor's motion for summary judgment on its counterclaim, and I grant the three defendants' motion for summary judgment dismissing the claim against them.

Factual Background

[7] Razor or its predecessor corporation entered into lease and license agreements with the Toronto District School Board and the Toronto Catholic District School Board for the use of the facilities, which comprised the following Toronto school fields: Monarch Park, Central Tech, and St. Patrick's. Razor then entered into license agreements with various licensees for use of the facilities during specified times. Although XTSC was not Razor's only licensee, it was its largest.

[8] Two of the facilities, Monarch Park and Central Tech, had domes erected from November to April so that they could be used year-round. St. Patrick's is an outdoor field and therefore is used only between April and November. Each license agreement was long-term, covering periods of eight years in the case of Monarch Park and Central Tech and ten years for St. Patrick's. When the licenses were terminated in February 2021, they were all mid-term.

[9] The agreements granted XTSC license to use the facilities for specified purposes at specified times. The purpose of the Monarch Park agreement is stated to be "soccer or touch football"; for Central Tech and St. Patrick's, the purpose was described simply as "Extreme Toronto Sports Club". XTSC used the facilities for competitive recreational adult sports leagues.

[10] Under each license agreement, the fees were to be paid monthly in advance. The licence fees were calculated on the basis of the scheduled times allocated to XTSC in each agreement.

[11] As part of its agreements with the school boards, Razor agreed to undertake significant capital improvements to the facilities at no cost to the school boards. Razor's lender for these improvements required evidence of Razor's long-term license agreements with XTSC to satisfy the lender of Razor's cashflow.

[12] In addition to its agreement with this major lender, Razor and XTSC entered into an arrangement by which XTSC loaned to Razor $700,000 toward the construction costs at the Central Tech facility (the "Central Tech loan agreement"). The Central Tech loan was secured against Razor's assets at Central Tech in the form of a *Personal Property Security Act* registration. The Central Tech loan agreement confirmed that XTSC would be provided long-term license agreements at the Central Tech and Monarch Park facilities. XTSC states that consideration for the Central Tech loan included the two license agreements at Central Tech and Monarch Park.

[13] The mechanics of the Central Tech payments were that Razor would deliver monthly invoices for the license time in advance of each season. Razor's repayment of the loan to XTSC would be deducted from the Central Tech invoice delivered to XTSC.

[14] On March 15, 2020, as a result of the COVID-19 pandemic, the provincial government announced a prohibition on organized sports league competition. The prohibition required Razor to close the facilities. XTSC had no access to them.

[15] In April 2020, the federal government introduced the Canada Emergency Commercial Rent Assistance program ("CECRA"). The program required lessors to submit applications on behalf of lessees. Lessors and lessees were required to reduce the amount owing under leases by 25 percent. The lessee would cover 25 percent of the payment, and the federal government would pay the remaining 50 percent.

[16] Razor prepared the required CECRA documentation. While its other long-term licensees signed the required documents, XTSC refused to do so. It refused to pay any fees for April, May, June, and July of 2020. It advised Razor that it would only sign the CECRA application if it received credit for half of March's pre-paid fees and if Razor agreed that XTSC would pay nothing for April to July 2020 inclusive.

[17] In August 2020, the facilities re-opened. XTSC used its licensed time and made its payments. Razor continued to ask XTSC to sign the CECRA application for the April to August period. By this time, XTSC had unpaid license amounts of just over $300,000. If the CECRA application was successful, the government would pay half of that amount, and XTSC would be responsible for 25 percent of it.

[18] About ten days before the deadline for the CECRA application, XTSC sent to Razor the pandemic-related agreement, the terms of which are discussed below. XTSC required that Razor sign the agreement before XTSC would complete the CECRA application forms. Once Razor

signed the pandemic-related agreement, XTSC signed the CECRA application. Razor received the government subsidy for this period.

[19] Under the pandemic-related agreement, XTSC received credit for 50 percent of the March rent. The parties agreed that XTSC owed no rent for the period between March 15 and July 31, 2020. Razor had not paid XTSC the monthly loan installments for the Central Tech loan for April to August 2020, inclusive, and the amounts owing were credited to XTSC's August rental invoice.

[20] On October 9, 2020, the provincial government announced a second suspension of adult sports league competition. The facilities remained open and could be used until November 23, 2020, but were subject to restrictions. There could be no inter-team competition, participants had to maintain a physical distance of two metres from any other person, and team sports could not be practiced or played. XTSC did not use the facilities during this time. On November 23, 2020, the government mandated another full shutdown.

[21] In December 2020, the federal government introduced a new rent relief program, the Canadian Emergency Rent Subsidy ("CERS"). This time, the lessees were the entities that had to apply for the relief. All of Razor's licensees other than XTSC applied for the relief. Despite Razor's urging, XTSC declined to do so.

[22] Razor advised XTSC on January 4, 2021 that it was in default of the license agreements for non-payment of rent for October, November, December, and January.

[23] On January 29, 2021, XTSC presented Razor with another pandemic-related agreement, which Razor refused to sign. Razor provided XTSC with its past-due invoices and requested payment.

[24] Razor advised XTSC that if it did not pay rent or apply for the government subsidy and remit payment received from the government, Razor would terminate the license agreements. XTSC advised that Razor was in breach of the Central Tech loan and threatened to enforce its lien against Razor's assets. Razor borrowed funds elsewhere and paid all outstanding principal and interest to XTSC. It requested an update on the payment of rent arrears and received no response.

[25] On February 26, 2021, Razor delivered notice that the licence agreements with XTSC had been terminated.

[26] When the facilities fully re-opened in July 2021, half of XTSC's license time was allocated to soccer clubs, and half to the defendant SSL, which XTSC states is its major competitor, and of which the personal defendant is a minority shareholder.

[27] The issues for the court to determine on these motions are:

Issue One: Is summary judgment procedurally appropriate?

Issue Two: Do the license agreements, properly interpreted, require XTSC to pay Razor license fees after October 9, 2023, when the facilities were unavailable for XTSC's intended use?

Issue Three: Was Razor's termination of the license agreements valid?

Issue Four: If Razor is entitled to summary judgment on the fees owing under the license agreement, should summary judgment issue dismissing XTSC's claim against the three defendants?

Issue One: Is summary judgment procedurally appropriate?

[28] Under Rule 20.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the court shall grant summary judgment if it is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence, or if the parties agree to have all or part of the claim determined by summary judgment, and the court is satisfied that it is appropriate to grant it. Rules 20.04(2.1) and (2.2) provide the court with expanded fact-finding powers to make this determination.

[29] In accordance with *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, in order to be appropriate for summary judgment, the evidence before the court must be such that a judge is confident that she can fairly resolve the dispute: at para. 57. The court must first determine if there is a genuine issue requiring trial based only on the evidence before it, without using the extended fact-finding powers in r. 20.04. There is no genuine issue requiring trial if the evidence allows the court to fairly and justly adjudicate the dispute by this proportionate procedure. If there appears to be a genuine issue requiring a trial, the court must determine if the need for a trial can be avoided by using the powers in rr. 20.04(2.1) and (2.2) These powers may be used if it would not be against the interests of justice: *Hryniak*, at para. 66.

[30] The parties agree that Razor's counterclaim should be determined by summary judgment. Further, XTSC concedes that if Razor succeeds in its counterclaim for arrears, summary judgment is appropriate on both the counterclaim and the action. That is, granting summary judgment on Razor's counterclaim will involve a finding that the agreements were validly terminated. XTSC's claim for damages for wrongful termination of the license agreements, and unjust enrichment based on that wrongful termination, comes to an end. If Razor's counterclaim is dismissed, XTSC does not seek summary judgment on its claim, as its claim for damages raises genuine issues requiring a trial.

[31] I agree with the parties that determination of the counterclaim by summary judgment is appropriate. The facts are not in dispute and do not turn on any findings of credibility or weighing of the evidence. The matter before the court is one of contractual interpretation. I am confident that I am able to find the facts and apply the necessary law and that this is a fair, just, and proportionate process for determining the counterclaim. I also agree that if I grant judgment to Razor on the counterclaim, judgment dismissing XTSC's claim should also be granted.

Issue Two: Do the license agreements, properly interpreted, require XTSC to pay Razor license fees after October 9, 2023, when the facilities were unavailable for XTSC's intended use?

Position of the parties

[32] Razor's position is that the license agreements did not represent a pay-per-use scheme. Rather, they required XTSC to pay for the bargained-for times, regardless of whether XTSC actually used, or was able to use, the facilities. There were specific bargained-for exceptions for which XTSC did not have to pay, as set out in the agreements. Apart from those expressly excepted times, XTSC was required to pay according for all of the time allocated to it.

[33] XTSC argues that it has no obligation to pay for the facilities at times that Razor could not make them available for XTSC's use. It argues that because the facilities were unavailable during the COVID shutdowns at the license times for the purpose stated in the license agreements, XTSC is not responsible or liable to pay license fees. The contracts, properly interpreted, demonstrate a "pay-if-available" agreement. XTSC argues in the alternative that Razor did not give adequate notice of the termination of the agreements.

[34] Each party relies on the terms of the contract and principles of contractual interpretation in support of its position. As stated, XTSC does not rely on the doctrine of frustration, or *force majeure.*

The terms of the license agreements

[35] The parties agree that fees payable to Razor under the license agreements were to be calculated based on the scheduled licensed times allocated to XTSC. The parties also agree that each license agreement contained terms specifying events that relieved XTSC of its payment obligation. Razor takes the position that these were the only terms that relieved XTSC of its obligation; XTSC argues that these terms indicate that XTSC did not have to pay when the facilities were not available.

[36] Under the license agreements, XTSC was not required to pay for allocated time in the following circumstances:

a. Razor was to advise XTSC 21 days in advance if a school event (or in the case of St. Patrick's, a "school or other event") may affect the availability of the license times. If so, XTSC was not responsible for fees relating to the loss of "rental time" (para. 4.2 of each agreement);

b. If the Central Tech facilities were not completed on time and an occupancy permit not obtained on time, XTSC was not responsible for any charges or expenses related to cancelled license times (para 8.2 Central Tech agreement);

c. If the Central Tech facility's opening was delayed, including any material delays for the dome, lighting, or turf, XTSC would commence its hours of use later than anticipated and need not pay for the missed time (Schedule A of the Central Tech agreement);

d. Each lease allowed XTSC a number of "exception days" to be used at its discretion. The Central Tech and Monarch Park agreements provided XTSC with nine such days, and St. Patrick's with seven. XTSC was required to provide 12 weeks advance

notice of these dates, and no rental fees would be payable for those days (Schedule A of each agreement);

e. The license times might be affected by the set-up or removal dates of the dome at Monarch Park and Central Tech (Schedule A of the Monarch Park and Central Tech agreements); and

f. In the case of the Monarch Park agreement, XTSC could provide Razor with 12 weeks' written notice of any license time it wished to cancel. Failing 12 weeks' notice, license time was to be paid in full (Para 5.1 Monarch Park agreement).

[37] The agreements imposed certain obligations on Razor. Each agreement required Razor to open "the doors to the Facilities at least thirty minutes before the Licence Time begins" (Para. 4.1 of each agreement). The Monarch Park agreement also had a term requiring Razor to maintain the facility with regular cleaning, ensuring the facility is suitable for sports activity throughout the term of the agreement (Para. 4.3 Monarch Park agreement). Each agreement also contains an "entire agreement clause" (Para. 10.1 of each agreement).

[38] The recitals in the agreements refer to XTSC's desire "to use" and Razor's desire to permit XTSC to use the facilities.

[39] In addition, Razor relies on the following provision found in each contract:

> 8.1 [Razor] shall not be liable for failure to perform any of its obligations under this agreement if it proves that the failure was due to an impediment beyond its control and that it could not reasonably he expected to have taken the impediment into account at the time of the conclusion of this agreement or to have avoided or overcome it or its consequences. The exemption provided by this section has effect only for the period during which the impediment exists. [Razor] must give notice to the Licensee of the impediment and its effect on [Razor's] ability to perform. If the notice is not received or deemed to have been received by the Licensee within a reasonable time after [Razor] knew or ought to have known of the impediment, [Razor] will be liable for damages resulting from such non-receipt.

[40] Razor argues that the provision shows the parties' intention to provide to Razor a one-sided exemption from its obligations, and to provide protection to Razor that XTSC did not share. XTSC contends that the provision is only a damages shield; it does not permit Razor to collect fees from XTSC when the facilities are not available.

Principles of Contractual Interpretation

[41] The principles of contractual interpretation are set out by the Supreme Court of Canada in *Creston Moly Corp. v. Sattva Capital Corp*., 2014 SCC 53, [2014] 2 S.C.R. 633, where the Court reiterated that the overriding concern is to determine the objective intent of the parties: at paras. 47-49. The Court explained at para. 47: "To do so, a decision-maker must read the contract as a

whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract."

[42] The court noted that ascribing meaning to words used in a contract depends on a number of contextual factors, which include the agreement's purpose and the nature of the relationship created by the agreement: at para. 48. The interpretive approach is to be practical and based on common sense: at para. 47.

[43] Surrounding circumstances are to be considered but may not be used to overwhelm the words in the contract: *Creston*, at para. 57. The surrounding circumstances may include objective evidence of the background facts: at para 58. The commercial purpose of the contract is part of the surrounding circumstances. The meaning of a commercial contract should also "be consistent with good business sense and avoid commercial absurdity": *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.* (2003), 63 O.R. (3d) 304 (C.A.), at para. 12.

[44] Razor argues that the parties intended XTSC to pay for the allocated time, whether it used it or not. There were only specific, narrow, and limited exceptions to this, and no other exceptions were intended. XTSC says that the contracts establish that XTSC was only required to pay for time that the facilities were actually available to it.

Analysis

[45] The starting point of the analysis is the plain words of each agreement, considered as a whole. When each agreement is read, the objective intention of the parties is clear: XTSC is to pay based on the time allocated to it, regardless of whether it uses or is able to use the facilities. Specific exemptions were provided for when XTSC did not have to pay. They were expressly agreed to between the parties and spelled out in the agreement and set out at paragraph [36] above. There is no *force majeure* or other clause excusing XTSC from its contractual obligation to pay in the circumstances that arose in this case; the parties did not bargain for such an exception. The courts are not to rewrite contracts, even when unforeseen or disastrous circumstances arise: *Hudson's Bay Company ULC v. Oxford Properties et al.*, 2021 ONSC 4515, 156 O.R. (3d) 427, at para. 2.

[46] XTSC makes six arguments, unrelated to the exceptions specified in the contract, in support of its position that the proper interpretation of the contract is "pay-if-available". I do not find the contract contemplates such an arrangement. I find that the surrounding circumstances and other arguments raised by XTSC lead to the conclusion that a proper interpretation of the contract is that XTSC was required to pay for allocated time, subject only to the exceptions for which it bargained and which are expressly set out in the agreements. I shall deal with XTSC's six arguments in turn.

1) The Contract is a license agreement, not a lease

[47] XTSC relies on the distinction between a license agreement and a lease, as explained at paras. 13-17 of *Arsandco Investments Limited v. Municipal Property Assessment Corporation* (2007), 279 D.L.R. (4th) 160 (Ont. S.C.), to ground its argument that fees were tied to access to the facilities. However, the court is bound by the words used and arrangements made in a contract, whether the particular contract at issue is a license agreement or a lease. The fact that XTSC had

a license to use the premises does not answer the question in this case, which is whether the specific license agreements entered into by the parties contemplated that fees were to be payable for times allocated under the license, or whether they were payable only if available. The distinction between a lease and a license is immaterial to that analysis.

2) The head leases between Razor and the school boards

[48] XTSC notes that the head leases between Razor and the school boards anticipate that the facilities will be used for field sports and require that Razor not bring about a breach of any municipal or other governmental regulation. Had Razor made the facilities available to XTSC during COVID, it argues, Razor would have been in breach of governmental regulations, and therefore in breach of Razor's head leases.

[49] This does not assist with the interpretation of the license agreements between Razor and XTSC. There is no dispute that XTSC could not use the facilities during most of the shutdown periods.[2] This does not assist with the interpretation of the payment requirements under the license agreements if the facilities were not able to be used at the licensed times.

3) The Central Tech loan agreement

[50] XTSC relies on the fact that under clause 8.1(d) the Central Tech loan agreement referred to in paragraph 12 above, which was negotiated at the same time as the Central Tech and Monarch Park license agreements, it was an event of default if XTSC "is denied access to either or both of the [Central Tech] and [Monarch Park] facilities for a period of 14 or more calendar days, or if [XTSC's] daily use of either or both of such facilities is in any way reduced." In addition, Razor was bound by clauses 7.1(c) and 7.2(b) of the Central Tech loan agreement to "punctually observe and perform all of its obligations" under both the loan and the license agreements.

[51] XTSC argues that these clauses support its arguments that the parties always intended that XTSC would only pay under the license agreements if it had access to the facilities.

[52] I find that the clauses support the opposite conclusion. The parties specifically turned their minds to XTSC being denied access to the facilities and its repercussions in the Central Tech loan agreement – it would constitute an event of default by Razor. In negotiating the license agreements at about the same time, however, the parties did not include any such clause. Instead, the parties set out specific events that would result in XTSC not having to pay for its allocated time. Being denied access to the facilities was not one of them. Had the parties wished to include a clause

[2] There is a dispute as to whether XTSC could have used the facilities for the period between October 9, 2020 and November 23, 2020 for something less than competitive league play. However, given my findings in the case, this issue is immaterial.

similar to that included in the Central Tech loan agreement, they could have done so. They chose not to.

[53] XTSC also relies on the following provision of the Central Tech loan agreement:

> The Sub-Licenses have been duly executed by the parties thereto, and shall each provide that subject to the Creditor's material breach and where standard cure periods have been provided, Raizenne (in the case of the CTS Sub-License) or Razor (in the case of the MPS Sub-License), as applicable, shall have no right to terminate the relevant Sub-License or to materially change the terms thereof, including the license fees set out therein, which license fees shall be permitted to increase or decrease with the rate of inflation, as per the Sub-Licenses.

[54] However, this provision begs the question as to whether XTSC has materially breached the license agreements by failing to pay. It does not assist in answering this question and therefore does not, on its own, assist XTSC.

4) The pandemic-related agreement

[55] The pandemic-related agreement referred to in paragraphs 18-19 above, signed several years after the license agreements were entered into and several months after the first COVID-19 shutdown, contains the following recital:

> WHEREAS the parties wish to confirm the terms upon which XTSC, Matthew and the Raizenne Entities will collaborate to navigate the COVID-19 Pandemic and the associated Team Sports Play Shutdowns as mandated by the Ontario Province and/or the City of Toronto al various stages throughout the Pandemic which was officially declared and started on March 15, 2020.

[56] It also contains various provisions changing the allocated rental time for the facilities, as well as the following:

> All Parties agree that during the Province of Ontario shutdown of all Teams Sports game play between March 15 and July 31, 2020. XTSC did not have access to the Raizenne Entities' Facilities nor were they allowed to run any of their sports leagues games and thus do not owe any rent for the period of March 15, 2020 to August 2nd, 2020.
>
> …
>
> All Parties agree that the Raizenne Entities will apply for rent relief for the period of August 1, 2020 to December 31, 2020 (and for all future months that the Canadian Government's Rent Relief program is extended to) for all 3 facilities; If the Raizenne Entities are successful in being granted Rent Relief' by the Government of Canada for any months and at any facility in the period of August

> 1, 2020 to December 31, 2020 and beyond, XTSC will in tum be refunded 50% of their monthly rent for that month at that facility.

[57] XTSC states that this was a forward-looking agreement and showed the parties' intention that XTSC was not required to pay for the facilities when it could not use them. XTSC does not dispute, however, that it required Razor to sign the agreement before it would sign the CECRA application for government rent subsidy, that XTSC was Razor's largest licensee, or that XTSC asked Razor to sign a new pandemic-related agreement after the November 2020 shutdown, which Razor declined to do. I find that these circumstances make clear that the pandemic-related agreement reflects a temporary agreement between the parties because they were at an impasse.

[58] The wording of the agreement does not govern how license payments would be managed in the future. Its stipulation that Razor was required to apply for future governmental rent subsidies was not possible; the government required lessees, not lessors, to do so. Further, the pandemic-related agreement contemplated that if Razor did receive rent subsidies from the government, XTSC would be refunded half of its rent. It does not stipulate that XTSC would pay no rent in the event of future shutdowns.

[59] XTSC also argues that the pandemic-related agreement constituted written notice under s. 5.1 of the Monarch Park agreement, set out at paragraph 36(f) above, that XTSC intended to cancel any license times that became subject to a pandemic lockdown. I do not agree. The plain and ordinary meaning of the notice of cancellation permitted in s. 5.1 of the Monarch Park agreement is that XTSC could cancel specific dates and times with 12 weeks' notice. It did not permit XTSC to provide a vague, blanket cancelation "if the facility becomes unavailable at any time". Nor do the words of the pandemic-related agreement purport to effect such an arrangement.

5) Other contractual provisions

[60] XTSC contends that other provisions in the licence agreements lead to the conclusion that it was relieved from payment obligations in the circumstances that came to pass. For example, the St. Patrick's agreement contained provisions requiring City of Toronto by-laws to be adhered to and followed at all times. It provided the following:

> Should the Licensee have any health and safety concerns about the facilities during the course of his Licence Agreement, it is the sole responsibility of the Licensee to inform [Razor] in writing of these concerns. No further use of the facilities is permitted until an inspection of the written concerns, by [Razor], takes place. The Licensee will not be responsible for any permit fees until given an "all clear" by [Razor].

[61] XTSC states that Razor was informed of the continuing health concerns and was unable to give the "all clear". I do not accept this argument. This paragraph contemplates a health concern that XTSC brings to Razor's attention, and that is within Razor's control to inspect and provide an "all clear". The COVID-19 shutdowns do not fit within the construct of this paragraph.

6) The commercial purpose of the agreements

[62] XTSC argues that the commercial purpose of the agreements was for XTSC to use the facilities to operate programmed sports leagues for teams who engaged in sports activity by playing games. Since such commercial purpose depends on the facilities being available, a "payable if available" interpretation must govern.

[63] As indicated above, the courts may look to the commercial purpose of an agreement as part of the surrounding circumstances during the exercise of contractual interpretation. However, the surrounding circumstances are not to overwhelm the words of the agreement.

[64] XTSC invited the court to imply a "payable if available" term. A contractual term may be implied when it is necessary to give business efficacy to the contract. The test is not whether "reasonable parties" would have agreed to the term. The suggested implied term must be necessary by the express terms of the contract: *MJB Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, at para. 29. I do not find the implication of the suggested term necessary or appropriate. To imply such a term would be to render the express exceptions that the parties bargained for and memorialized in the agreements meaningless. I do not accept that the term XTSC seeks to have implied is consistent with the parties' intention. I decline to read in such a term and to rewrite the parties' contract.

Conclusion on contractual interpretation

[65] I find that the agreements, properly interpreted, require XTSC to pay the license fees for the contracted-for license times, regardless of whether it uses or is able to use the allocated times. I find that the agreements expressly articulate the only exceptions to XTSC's obligation to pay. They are summarized in paragraph 36 above. Therefore, XTSC was obliged to pay license fees during the second shutdown period.

Issue Three: Was Razor's termination of the license agreements valid?

[66] XTSC raises two arguments in support of its position that, even it was in arrears, Razor's termination of the agreements was invalid. First, XTSC claims that the notice Razor provided was vague and ambiguous and did not constitute clear and unequivocal notice. Second, XTSC argues that the agreements did not give Razor the right to terminate them.

[67] With respect to the notice argument, Razor states that it provided proper notice by its email of January 4, 2021. That email stated in part as follows: "As you know we have not collected rent for October, November, December and now January. This means that you are technically in default with your lease. I am required to give you written notice." The email went on to discuss the government rent relief application. Notices or communications under the agreement were permitted to be sent by email.

[68] The parties corresponded after that date. Razor asked XTSC repeatedly when it was applying for CERS. Razor expressed its understanding that XTSC intended to apply, and that arrears under the license agreements would be settled. On January 12, 2021, Razor advised XTSC that "all rent in arrears will need to be paid by February 1st, 2021."

[69] In February, it became clear that XTSC was neither going to apply for CERS nor pay the license amounts to Razor directly. Razor paid out the Central Tech loan, including the amounts it was in arrears, and advised XTSC that its agreements had been terminated.

[70] I find that the notice Razor provided to XTSC was sufficient. Razor advised XTSC that it was providing notice of its arrears. It advised XTSC repeatedly that XTSC's rent was due. The exchanges between the parties made it clear that if XTSC did not provide funds to Razor, either by accessing the CERS program or funding the amounts itself, Razor would terminate the license agreements. XTSC was clearly aware that Razor would terminate the agreements if it did not pay its arrears.

[71] XTSC's second argument, that Razor was not entitled to terminate the agreements even if XTSC was in breach of them, is based on paragraph 7.2 of the Monarch Park and Central Tech licenses. According to XTSC, those provisions limit Razor's rights in the event of a breach by XTSC. The agreements state:

> 7.2 The monthly rental charges are due on the 1st day of every month, If the Licensee is late making the monthly rental payment or if the cheque bounces, [Razor] will notify the Licensee in writing of such delinquency and the Licensee will have 30 days to rectify the situation and provide [Razor] with a valid cheque for the monthly charges. If the Payment is not received within 30 days of such notice, [Razor] may withhold access to the Facilities from the Licensee, and [Razor] may put the Facilities to such alternative uses as it sees fit until all arrears rental payments are made and the account is once again in good standing.

[72] The corresponding provision in the St. Patrick's agreement is slightly different:

> 7.2 If the Licensee materially breaches any terms of this agreement [Razor] may immediately terminate the Licensee's right to use the Facilities if not remedied to the satisfaction of [Razor], acting reasonably, within 30 days. Also, in the event of such a material breach, [Razor] may, in addition to any other remedy and without notice, penalty or payment, withhold access to the Facilities from the Licensee as of the date of the material breach, and [Razor] may put the Facilities to such alternative uses as it sees fit.

[73] XTSC argues that, in the event of non-payment by XTSC, Razor's only recourse under the Central Tech and Monarch Park agreements was to withhold access to the facilities and put the facilities to alternative uses until the breach was remedied. Razor notes that this was not a case of late payment – XTSC had advised it intended never to pay the outstanding amounts. To require Razor to be bound by the agreements without a right to terminate in the event of perpetual material breach would be a commercial absurdity. XTSC cannot reasonably be allowed not to pay without Razor being permitted to terminate.

[74] I find that Razor was not limited by paragraph 7.2 of the license agreements. Those paragraphs contemplated late payments and an ultimate return to "good standing" of the arrears. They did not contemplate that Razor had to tolerate perpetual material breaches that XTSC had no

intention of correcting. I agree with Razor that such an interpretation would result in a commercial absurdity and was never the parties' intention.

[75] I find that Razor validly terminated the license agreements.

Issue Four: If Razor is entitled to summary judgment on the fees owing under the license agreement, should summary judgment issue dismissing XTSC's claim against the three defendants?

[76] As indicated above, XTSC agrees that if I find that Razor succeeds on its counterclaim, the claim should also be dismissed by way of summary judgment. Because the claim is predicated on a finding that Razor wrongfully terminated the license agreements, and I have found the opposite, the claim must fail. Judgment dismissing the claim shall issue.

Disposition

[77] The two motions for summary judgment are granted. I have finally decided all of the issues in the proceeding. Razor shall have judgment on its counterclaim against XTSC in the amount of $338,984.20 plus HST. XTSC's claim against all three defendants is dismissed.

[78] The parties are strongly encouraged to agree upon costs. If they are unable to do so, Razor may provide up to three double-spaced pages of written submissions on costs within seven days. XTSC may provide responding submissions of the same maximum length within seven days thereafter. There shall be no reply submissions without leave. Submissions are to be made to my judicial assistant at linda.bunoza@ontario.ca.

L. Brownstone J.

Date: May 10, 2024