CITATION: The Decorators Choice Paint Store Ltd. v. Innes Crossing Inc., 2024 ONSC 4418
COURT FILE NO.: CV-23-93941
DATE: 2024-08-09

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
The Decorators Choice Paint Store Ltd.	David Sherriff-Scott, for the Plaintiff / Moving Party
– and –	
Innes Crossing Inc.	Not Represented
	HEARD: June 11, 2024

REASONS FOR JUDGMENT

REES J.

I. Overview

[1] The plaintiff, The Decorators Choice Paint Store Ltd., is a home décor retailer. For over twenty years, it has leased premises from the defendant, Innes Crossing Inc. Decorators Choice is a thriving business and requires a larger space within the geographic boundaries of its exclusivity agreements with distributors to continue to grow.

[2] In February 2022, Decorators Choice executed a 10-year commercial lease with Innes Crossing for a larger space. But Innes Crossing did not abide by its side of the contract. It did not complete its required work on the new premises, nor give Decorators Choice possession.

[3] Innes Crossing did not respond to Decorators Choice's statement of claim. It has been noted in default.

[4] Decorators Choice brings this motion for default judgment seeking: a declaration that the lease was validly executed, specific performance of the lease, and damages. It asks to adjourn its damages claim until they have fully crystallized.

[5] I conclude that the lease was validly executed, and that Innes Crossing breached the lease. I grant specific performance for the full term of the lease, and I adjourn the damages claim.

II. Issues

[6] This motion for default judgment raises the following issues:

a. Was the commercial lease validly executed?

b. Is the defendant in breach of the commercial lease?

c. Should the plaintiff be granted specific performance?

d. Should the plaintiff's damages claim be adjourned?

III. Analysis

A. The law of default judgment

[7] Under r. 19.02(1)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, a defendant that has failed to defend a proceeding and has been noted in default is deemed to admit the truth of all the allegations of fact made in the statement of claim.

[8] In these circumstances, a plaintiff can move for default judgment under r. 19.05(1). A motion for default judgment shall be supported by evidence given by affidavit if the claim is for unliquidated damages: r. 19.05(2). A party moving for default judgment must show that the facts as alleged in the claim, while deemed to be admitted by the defendant noted in default, entitle the moving party to judgment: r. 19.06.

[9] On a motion for default judgment, the court must consider the following questions:

a. What deemed admissions of fact flow from the facts pleaded in the statement of claim?

b. Do those deemed admissions of fact entitle the plaintiff, as a matter of law, to judgment on the claim?

c. If they do not, has the plaintiff adduced admissible evidence which, when combined with the deemed admissions, entitles it to judgment on the pleaded claim?

See *Elekta Ltd. v. Rodkin*, 2012 ONSC 2062, at para. 14; *Viola v. Hornstein*, 2009 CanLII 16584 (Ont. S.C.), at para, 18.

[10] Based on the deemed admissions of fact that flow from the facts pleaded in Decorators Choice's statement of claim and the evidence filed, I find that Decorators Choice is entitled to judgment on the claim.

B. Was the commercial lease validly executed?

[11] Since 1993, Decorators Choice has operated in Ottawa's east end. It is owned and operated by Andre and Silvana Pace. Since 2003, Decorators Choice has operated its retail store at 1495A Innes Road. The store is 3,600 square feet, which is leased from Innes Crossing.

[12] In 2018, Decorators Choice began to outgrow its current location. It needed a new, larger space to accommodate increased demand. Decorators Choice began discussing plans with the former President of Innes Crossing, Peter Dent, and its former Vice-President, Marty Koshman, to acquire a new, larger space.

[13] Mr. Dent passed away suddenly in July 2020. After his death, Mr. Dent's spouse, Susan Dent, assumed control of Innes Crossing. Ms. Dent has become president and Mr. Koshman was terminated.

[14] In February 2021, Decorators Choice found a suitable location when Innes Crossing approached Decorators Choice about an opportunity to lease new premises in the same shopping complex as its current location. The new location is 7,160 square feet, which is 3,560 square feet larger than its current location.

[15] On February 1, 2022, Decorators Choice and Innes Crossing entered into a commercial lease agreement (the "Lease") to lease 1491 Innes Road, Unit 101B. The Lease was executed by Mr. Pace, on behalf of Decorators Choice, and Ms. Dent, on behalf of Innes Crossing.

[16] After executing the Lease, Decorators Choice completed construction plans for the space, retained contractors, and ordered increased volumes of inventory on the expectation that it would be granted possession of the new premises under the Lease.

[17] I find that the Lease was validly executed.

C. Is the defendant in breach of the commercial lease?

[18] Under the Lease, Decorators Choice was to take possession of the new location by June 1, 2022. Innes Crossing was to complete the Landlord's Work,[1] as specified in the Lease, and deliver written notice that this work had been completed to allow Decorators Choice to complete the Tenant's Work. The 10-year term of the Lease was to begin on September 16, 2022. At that time, the lease for Decorators Choice's current location was to end.

[19] But Innes Crossing did not take steps to hire a contractor to complete any of its required work until November 2022, several months after the possession date under the Lease. At that time, Innes Crossing retained Lundy Construction. Yet its required work is still not complete because it

refused to pay Lundy Construction. As a result, Lundy Construction and its subcontractors have refused to complete the Landlord's Work and have terminated their business relationship with Innes Crossing. Innes Crossing has not attempted to retain a new contractor, nor has it facilitated Decorators Choice taking possession of the new premises. Innes Crossing has also refused to provide the City of Ottawa with its consent to release a copy of the building plans to Decorators Choice, which is required before further work can be done and inspections completed.

[20] Innes Crossing ignored Decorators Choice's repeated demands to rectify the situation.

[21] I find that Innes Crossing has breached the Lease. It has failed to take reasonable steps to complete the Landlord's Work as required by the Lease. And it has failed to provide Decorators Choice with possession of the new premises by the Possession Date. Innes Crossing has therefore deprived Decorators Choice of the whole benefit of the Lease and use of the new premises. It remains in breach of the Lease to this day.

[22] Innes Crossing's reason for the breach is unexplained. Although Ms. Dent, who executed the Lease on behalf of Innes Crossing, initially hired Lundy Construction to begin the Landlord's Work, and assured Decorators Choice that its possession of the new premises was a top priority, Ms. Dent has since simply refused to reply to correspondence or to answer phone calls from Decorators Choice. Innes Crossing was similarly unresponsive to the demand letter sent by Decorators Choice's solicitors. As discussed, Innes Crossing also ignored the statement of claim served on it and was noted in default. Decorators Choice served Innes Crossing with its motion record and factum on this motion for default judgment. Again, Innes Crossing did not respond.

D. Should the plaintiff be granted specific performance?

[23] Decorators Choice seeks both damages and specific performance of the Lease. I will consider its request to adjourn its damages claim below. Here, I consider its claim for specific performance.

Legal test

[24] Damages are the usual remedy for breach of contract, but specific performance is available where the plaintiff shows that the land rather than its monetary equivalent better serves justice between the parties: *Bellwoods Brewery Inc. v. 1896841 Ontario Limited*, 2023 ONSC 2845, at para. 71, aff'd 2023 ONCA 851. It is thus an exaggeration to say that specific performance is an extraordinary remedy.

[25] Specific performance is a discretionary remedy: *Dhatt v. Beer*, 2021 ONCA 137, at para. 42. A plaintiff seeking specific performance must show that monetary damages would be inadequate to compensate for its loss of the property. The court will consider the following factors:

a. The nature of the property involved, including whether the property is unique,

b. The adequacy of damages as a remedy; and

c. The parties' behaviour, having regard to the equitable nature of the remedy.

[26] These principles apply equally to a contract for the lease of land and a contract for the sale of property: *Crossview Developments Inc. v. 22624443 Ontario Limited*, 2016 ONSC 647, at para. 83.

[27] "Unique" in this context does not mean one-of-a-kind, singular, or incomparable: *John E. Dodge Holdings Ltd v. 805062 Ontario Ltd* (2001), 56 O.R. (3d) 341 (S.C.), at para. 60, aff'd 63 O.R. (3d) 304 (C.A.). It means that the property has a quality that cannot be readily duplicated elsewhere. It is assessed in relation to the proposed use of the property. The property must be particularly suitable to the proposed use: *Di Millo v. 2099232 Ontario Inc.*, 2018 ONCA 1051, at para. 66; see also *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, at para. 22.

[28] Assessing the uniqueness of a property is fact specific. It is measured both subjectively and objectively, based on the reasonable person familiar with the facts: *John E. Dodge Holdings*, at para. 59 (S.C.).

[29] I turn first to the nature of the property involved. A key factor in assessing the proposed use of the property is Decorators Choice's contractual agreements with its distributors. Under its distribution agreement with Benjamin Moore, Decorators Choice is required to operate its store in Ottawa's east end, within the geographic area from St. Laurent Boulevard to Blackburn Hamlet. Further, Decorators Choice negotiated an exclusivity agreement with Pure & Original based on the design for the new premises.

[30] The new premises have the following qualities that cannot, when considered wholistically, be readily duplicated elsewhere:

- They are within the geographic boundaries that Decorators Choice may sell Benjamin Moore products and are within the boundaries of the exclusivity agreement that Decorators Choice entered with Pure & Original.

- They are in the same shopping centre as the current store, allowing for a seamless transition to a new space without disrupting customers.

- They are near a highway with good access for customers and suppliers.

- The extra 3,560 square feet would permit Decorators Choice to redesign its store and expand its contractor volume, retail offerings, and online sales.

- The surrounding area is a home improvement and home decorating hub, which increases the customer base.

- The shopping centre within which the new premises are located has ample dedicated parking for customers.

[31] Decorators Choice has been unable to find an alternative space that would meet its business needs, particularly its obligations to Benjamin Moore and Pure & Original. Its real estate agent advised that "there are no suitable spaces available for lease within the target market area."

[32] I am therefore persuaded that the property is "unique".

[33] Second, I am satisfied that monetary damages would be an inadequate remedy. Only an order for specific performance would put Decorators Choice in the position it would have been in had the contract been performed. The new premises would allow Decorators Choice to:

- Implement Benjamin Moore's "Store of the Future Program", which would allow Decorators Choice to remain relevant and competitive.

- Double its paint output, and lead to an increase in ancillary sales for brushes, rollers, sandpaper, and caulking.

- Build a new wallpaper design centre and interactive display showcase for wallcoverings from Hunter Douglas, Altex, and Alta brands, as well as custom drapery.

- Have an interactive display for Farrow and Ball products, increasing customer awareness of the brand, and improving sales.

- Become the exclusive seller of an increasingly popular limewash product from Pure & Original. Their exclusivity agreement was obtained based on the location and design plans for the new premises.

- Develop an Amazon Storefront for custom drapery products.

[34] These opportunities and profits would only come with the new premises. Damages could not adequately remedy the long-term effect on Decorators Choice's operation as a business. Only moving into the new premises would allow Decorators Choice to unlock these opportunities and grow as a business. The new premises, rather than its monetary equivalent, better serves justice between the parties.

[35] Finally, Decorators Choice has acted in good faith. It has not engaged in any conduct which would disentitle it to equitable relief. It has continued to insist that Innes Crossing meet its obligations under the Lease. Decorators Choice tried to work with Innes Crossing despite its failure to comply with its obligations under the Lease. Decorators Choice gave Innes Crossing several chances to uphold the latter's side of the bargain and to facilitate possession of the new premises. Decorators Choice is ready to perform its side of the bargain.

Should the court decline to order specific performance because of the long-term nature of the lease?

[36] As discussed, specific performance is a discretionary remedy. In deciding whether to exercise my discretion, I have considered whether the ongoing court supervision of a 10-year lease is a basis to deny relief.

[37] The United Kingdom House of Lords has raised concerns about ordering specific performance of a long-term commercial lease when doing so would require the defendant to carry on a business: *Co-operative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.*, [1997] UKHL 17, [1998] A.C 1. The defendant had closed its supermarket at the plaintiff's shopping centre, in breach of its 35-year lease. This was part of the defendant's closure of 27 unprofitable supermarkets. The House of Lords, per Lord Hoffmann, declined to order specific performance for several reasons.

[38] Most compellingly, it declined to do so because the English courts will not normally enjoin a defendant to carry on a business, especially where the business is losing money. Enjoining a defendant to carry on a business over the long term is qualitatively different than ordering a defendant to achieve a specific result or to perform specific acts. The former raises concerns about ongoing enforcement and repeated proceedings to enforce compliance. The latter usually does not. The House of Lords was also concerned that enforcement through the court's contempt power would be unsuitable to adjudicate whether the business was being run according to the court's order.

[39] By contrast, civil law jurisdictions more liberally order specific performance: see e.g. *Cie de construction Belcourt ltée v. Golden Griddle Pancake House Ltd.*, [1988] R.J.Q. 716 (S.C.); *Highland & Universal Properties Ltd. v. Safeway Properties Ltd.*, 2000 SC 297 (Scot. Ct. Sess.); *Retail Parks Investments Ltd. Royal Bank of Scotland plc (No. 2)*, 1996 SC 227 (Scot. Ct. Sess.).

[40] *Argyll* has been applied in Ontario: *Centre City Capital Ltd. v. Bank of East Asia (Canada)*, [1997] O.J No. 5218 (Gen. Div.); *Village Square (Burlington) Ltd. v. National Bank of Canada*, [1997] O.J. No. 4592 (Gen. Div.): *West Nipissing Economic Development Corp. v. Weyerhaeuser Co.*, [2002] O.J. No. 4731 (S.C.). Courts in Ontario have, however, ordered specific performance of long-term commercial leases in appropriate circumstances: *Crossview Developments Inc. v. 22624443 Ontario Ltd.*, 2016 ONSC 647 (ordering specific performance of a 10-year lease); *Bellwoods Brewery* (ordering specific performance of a 20-year lease).

[41] The holding in *Argyll* should not be overstated. *Argyll* focused on the policy and practical reasons against requiring a defendant to carry on a business over the long term. But there is no general principle in Ontario against ordering specific performance of a long-term commercial lease.

[42] I am satisfied that the concerns raised in *Argyll* are not likely to materialize on the record before me. First, the order would not require Innes Crossing to carry on a business it is not

otherwise operating. Innes Crossing is a going concern as a commercial landlord. The premises are part of its real estate portfolio. Innes Crossing and Decorators Choice have also been in a landlord-tenant relationship for over 20 years – a business relationship which continues to this day through the lease of Decorators Choice's current premises.

[43] Second, there is no evidence before me to suggest that an order for specific performance would lead to Innes Crossing operating at a loss. Recall that it was Innes Crossing which approached Decorators Choice about leasing the new premises. The rent that would be payable by Decorators Choice results from a negotiation between two sophisticated commercial parties.

[44] Finally, the terms of the Lease are precise enough to permit the court to adjudicate whether the defendant is complying with an order for specific performance. No enforceability problem arises.

[45] Therefore, I order specific performance of the Lease.

E. Should the plaintiff's damages claim be adjourned?

[46] A court may order both specific performance and damages resulting from a landlord's breach of the terms of a lease: *Bellwoods Brewery*, at paras. 105-07; *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 99.

[47] Here, Decorators Choice seeks both specific performance of the Lease and damages based on the delay caused by Innes Crossing's ongoing breach of the Lease. Decorators Choice has notified Innes Crossing of the choice of remedies it is seeking.

[48] Decorators Choice's damages will not have fully crystallized until it completes the Landlord's Work under the Lease and takes possession of the premises. I therefore adjourn this aspect of the motion for default judgment.

IV. Disposition

[49] I declare that the Lease was validly executed, and that Innes Crossing has breached the Lease. The Possession Date would have been around June 1, 2022, subject to the availability of trades and material, and the Commencement Date would have been September 16, 2022, but for Innes Crossing's breach.

[50] Decorators Choice is granted an order for specific performance for the full term of the Lease – that is, 10 years.

[51] I order Innes Crossing to immediately give Decorators Choice possession of the premises so that it may complete the Landlord's Work under the Lease. I further order Innes Crossing to take all steps necessary to facilitate Decorators Choice taking possession of the premises.

[52] The 105-day fixturing period in Schedule "F" of the Lease, under which Decorators Choice is only required to pay Additional Rent, does not commence until Decorators Choice has completed the outstanding Landlord's Work and obtained the requisite permits necessary to commence the Tenant's Work.

[53] Decorators Choice shall pay Monthly Minimum Rent under section 1.01(8) of the Lease. Decorators Choice's responsibility to pay monthly rent shall not commence until it has completed both the outstanding Landlord's Work and the Tenant's Work and continues for a 10-year term under section 1.01(8) and section 1.01(17) of the Lease.

[54] I order the City of Ottawa to release to Decorators Choice a certified copy of Innes Crossing's building plans and any other required plans or permits and to complete the requisite inspection of the premises following Decorators Choice's completion of the outstanding Landlord's Work.

[55] Decorators Choice's claim for damages is adjourned. Decorators Choice may file a supplementary record and submissions on its damages claim before the return of the motion. I am seized of the damages claim.

V. Costs

[56] Rather than address costs twice, I will consider costs on the return of the motion.

Justice Owen Rees

Released: August 9, 2024

[1] Capitalized terms in these reasons are as defined in the Lease.