COURT OF APPEAL FOR ONTARIO

CITATION: Pinnacle International (One Yonge) Ltd. v. Torstar Corporation, 2024 ONCA 755
DATE: 20241015
DOCKET: COA-22-CV-0255

Gillese, Brown and Sossin JJ.A.

BETWEEN

Pinnacle International (One Yonge) Ltd.

Plaintiff (Respondent)

and

Torstar Corporation

Defendant (Appellant)

Timothy Pinos and Emma Carver, for the appellant

Julia Schatz and Meg Bennett, for the respondent

Heard: April 18, 2024

On appeal from the judgment of Justice Andra Pollak of the Superior Court of Justice, dated August 29, 2022, with reasons reported at 2022 ONSC 4879.

Gillese J.A.:

I. OVERVIEW

[1] This appeal arises from a commercial lease requiring Torstar Corporation ("**Torstar**"), the tenant, to pay Pinnacle International (One Yonge) Ltd. ("**Pinnacle**"), the landlord, net "profit" earned from a sublease.

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[2] Pinnacle sued Torstar for profit it allegedly made on a sublease. Torstar maintained that it made no profit because it had paid Pinnacle more rent for the sublet premises than what it received from its subtenant. Torstar also contended that Pinnacle's claim was subject to a two-year limitation period because it was governed by the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B. (the "***LA 2002***").

[3] Torstar and Pinnacle brought duelling summary judgment motions. The motion judge rejected Torstar's position on both matters. She found that Torstar was not permitted to consider its full rental costs when determining whether it had profited from the sublease. She further found that the *Real Property Limitations Act*, R.S.O. 1990, c. L.15 (the "***RPLA***") applied. Consequently, by judgment dated August 29, 2022 (the "**Judgment**"), she ordered Torstar to pay Pinnacle over $1.1 million plus interest and costs.

[4] Torstar appeals.

[5] As I explain below, in my view, the motion judge erred in both determinations. Thus, I would allow the appeal.

II. BACKGROUND

The parties

[6] Pinnacle is a Canadian real estate developer of luxury condominium residences, hotels, and commercial developments. Torstar is a Canadian media

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conglomerate with a long history in daily and community newspapers, and digital businesses.

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[7] Torstar occupied the commercial building at 1 Yonge Street in Toronto (the "**Building**") from 1971 to 2022. Pinnacle acquired the Building on July 31, 2012, and was Torstar's landlord from then until 2022.

The Building

[8] Understanding the Building's physical layout provides crucial context for interpreting the lease and sublease at issue in this matter.

[9] As the picture below shows, the Building consists of two connected, adjacent sections: (i) a 25-storey "tower" (the "**Office Tower**") and (ii) a six-storey "Podium" that includes a three-storey open space warehouse extending from the ground to the ceiling of the third floor (the "**Warehouse**").

Pictured: The Building, which is made up of the Podium containing the three-story Warehouse (left) and the Office Tower (right).

[10] The Warehouse was designed to house Torstar's printing operations, including cranes suspended from the ceiling of the third floor. The second and third storeys of the Warehouse are open air space without floors. The only means of access to the second and third storeys is through the ground floor of the Warehouse.

[11] The third storey of the Warehouse (the "**third-floor Open Air Space**") is the space which underlies this appeal. It is inaccessible from the third floor of the Office Tower. It consists only of air.

A timeline of the key events

1971	Torstar begins occupying the Building
1995	Torstar subleases the first and second floors of the Warehouse to Canada Post
August 2000	Torstar and 1428501 Ontario Limited (the "**Original Landlord**") enter into a lease dated August 22, 2000 (the "**Lease**")
July 2010	The Canada Post sublease expires. Torstar surrenders the first and second floors of the Warehouse to the Original Landlord
July 2011	Torstar and College Boreal ("Boreal") enter into a sublease dated July 1, 2011 (the "Boreal Sublease") to commence January 1, 2012

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	The Original Landlord, Torstar, and Boreal execute a Consent to the Boreal Sublease dated July 1, 2011
October 2011	Boreal's 90-day fixturing period begins
January 2012	Boreal's 90-day fixturing period ends and the five-month rent-free period begins
June 2012	Boreal starts paying rent to Torstar
July 31, 2012	Pinnacle buys the Building and assumes the Lease and Boreal Sublease. From the outset, Pinnacle rents out the Warehouse for private events
2018	Pinnacle and Torstar engage in protracted lease renewal negotiations
January 2019	Torstar and Pinnacle enter into a Fifth Lease Amending Agreement
April 22, 2019	For the first time, Pinnacle alleges Torstar is in breach of its Lease obligations by failing to remit profits earned on the Boreal Sublease
June 1, 2020	Pinnacle issues a statement of claim (the "Claim") for millions of dollars of alleged profits Torstar earned on subleases

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May 31, 2021	Torstar brings a summary judgment motion seeking to have the Claim dismissed
August 31, 2021	Pinnacle brings a cross-motion for summary judgment

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The Lease

[12] Under the Lease, Torstar pays “Basic Rent” and “Additional Rent” on a per square foot per annum basis. Additional Rent consists of Realty Taxes, Proportionate Share of Operating Costs, Utilities, and Additional Services, if any.

[13] The premises Torstar leased originally included the Warehouse and much of the Office Tower. Throughout the life of the Lease, the leased premises included the entirety of the third floor of the Building. Article 1.4 of the Lease sets out the third floor Rentable Area in the Building as 65,534 square feet. The floorplan for the Building’s third floor is included in Schedule B-1 to the Lease; it is appended to these reasons as Schedule A. The floor plan shows the third floor as consisting of (i) the third floor of the Office Tower (46,707 square feet) and (ii) the third-floor Open Air Space of the Warehouse (18,827 square feet). The third-floor Open Air Space is marked with an X; it has never been accessible, or capable of occupation or use, from the third floor of the Office Tower.

[14] Article 1.11 stipulates that the Schedules form part of the Lease.

[15] Article 8.1 of the Lease gives Torstar the right to sublet the Premises in accordance with its terms. At issue in this appeal is the requirement in art 8.1 that

Torstar pay the landlord, as Additional Rent, any profit net of all reasonable costs Torstar incurred in connection with the sublease. The relevant part of art. 8.1 reads as follows:

> **8.1 Assignment, Subletting:** The Tenant shall have the right: (i) to assign this Lease with the prior written consent of the Landlord, not to be unreasonably withheld, and (ii) to sublet … all, or any part of the Premises upon notice to the Landlord… Upon any such assignment or sublet, the Tenant shall not be relieved from its obligation to pay Rent and to perform all of the covenants, terms and conditions herein contained. … Any profit (net of all reasonable costs incurred by the Tenant in connection therewith) earned by the Tenant in assigning this Lease or subletting or licensing all or any part of the Premises…shall be paid by the Tenant to the Landlord as Additional Rent… [Emphasis added.]

[16] Since entering into the Lease, Torstar has continuously paid rent for the full third floor of the Building, including the third-floor Open Air Space.

The Boreal Sublease

[17] On July 1, 2011, Torstar and Boreal entered into the Boreal Sublease. The Boreal Sublease began on January 1, 2011, and ended on August 30, 2020.

[18] The third-floor plan appended to the Boreal Sublease is appended to these reasons as Schedule B. Although the orientation of the third-floor plan in the Boreal Sublease is different from that of the third-floor plan attached to the Lease, the footprint of the two plans is identical. Both the third-floor plan included in the Boreal Sublease and the third-floor plan included in the Lease show the identical usable

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and unusable areas of the third floor of the Building, with the latter marked by an "X" across it.

[19] "Premises" is defined in recital A of the Boreal Sublease as including the "3rd Floor … of the Building".

[20] Recital C of the Boreal Sublease is critical to the resolution of this appeal. It reads as follows:

> … Torstar … agree[s] to sublease to [Boreal] and [Boreal] agrees to sublease commencing January 1, 2012 that part of the Premises outlined in red on Schedule "A" such part being the entire 3rd Floor of the Building and comprising an area of approximately forty-six thousand seven hundred and seven square feet (46,707 sq. ft.) (the Sublet Premises") for part of the remainder of the term of the Head Lease on the terms and conditions contained herein. The parties agree that the area of the Sublet Premises has been deemed to be forty-six thousand seven hundred and seven square feet (46707 sq. ft.) (the "Deemed Rentable Area) and shall not be subject to re-adjustment by any of the parties hereto; [Emphasis added.]

[21] For the entirety of the Boreal Sublease, neither Torstar nor Boreal had access to, or use of, the third-floor Open Air Space.

Access to and use of the Warehouse

[22] From 1995 to 2010 – that is, for the duration of the sublease between Torstar and Canada Post – Torstar's only access to the Warehouse space was as sub-landlord to Canada Post.

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[23] After the Canada Post sublease expired in July 2010, on the finding of the motion judge, Torstar surrendered the ground floor and the second floor of the Warehouse space to the Original Landlord.

[24] Since Pinnacle acquired the Building in 2012, Torstar has not had access to, or use of, the Warehouse. Consequently, Torstar does not have full knowledge of how Pinnacle has used the Warehouse since 2012. However, Torstar is aware that Pinnacle has used the Warehouse space for the following purposes.

[25] From the outset of its ownership of the Building in 2012, Pinnacle has rented out the Warehouse for “private special events like weddings and different corporate events” and marketed it to third parties as an “Event Space” with a 46-foot ceiling. The specification of a 46-foot ceiling necessarily includes the third-floor Open Air Space.

[26] Further, Pinnacle has rented out the Warehouse – including the third-floor Open Air Space – to Lighthouse Immersive Inc. (“**Lighthouse**”) for at least two long-term entertainment events: (i) the “Immersive Van Gogh Exhibit”, and (ii) the “Illusionarium, the World’s First Immersive Magic Show”. Prior to the opening of the Van Gogh exhibit, Lighthouse installed a floor-to-ceiling wall in the Warehouse, dividing the entrance and a gift shop from the exhibition space. The wall extends to the third-floor ceiling of the Warehouse, through the third-floor Open Air Space. In the exhibit space, digital images are projected on the walls, and these

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projections covered the full three-storey height of the Warehouse, including the third-floor Open Air Space. Lighthouse installed speakers from the third-floor ceiling, with Pinnacle's permission. Illusionarium shared a similar setup.

[27] At no point did Pinnacle seek Torstar's permission to use the Warehouse space or the third-floor Open Air Space.

The lead-up to litigation

[28] Pinnacle and Torstar engaged in extensive lease negotiations in 2018, culminating in a new lease agreement that commenced in January 2019. At no time during the lease negotiations (or at any time prior) did Pinnacle raise a concern that Torstar had profited from its subleases or that it was in breach of art. 8.1 of the Lease by failing to remit net profits from its subleases.

[29] On April 22, 2019 – not long after Torstar agreed to extend its tenancy with Pinnacle – Pinnacle wrote to Torstar and alleged, for the first time, that Torstar was in breach of its obligations under the Lease by failing to remit profits accrued from the Boreal Sublease.

[30] By letter dated May 15, 2019, Torstar responded that it had not profited from the Boreal Sublease, noting that the Original Landlord had been aware of the terms of the Boreal Sublease and had consented to it.

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[31] Shortly thereafter, Torstar provided Pinnacle with a chart showing that the gross rent Torstar paid for the third floor of the Building substantially exceeded the gross rent it had received under the Boreal Sublease.

[32] Torstar provided the following chart in its materials. It shows that the aggregate rent that Torstar paid to Pinnacle for the entire third floor has always been greater than the aggregate rent Torstar received from Boreal. It shows the amounts Torstar paid Pinnacle for gross rent (Basic plus Additional Rent) for the third floor of the Building during the period of the Boreal Sublease. The gross rent ranged from $19.15 to $21.89 per square foot, paid on 65,534 square feet, inclusive of the third-floor Open Air Space. It also shows the gross rent Boreal paid Torstar, which ranged from $24.91 to $26.99 per square foot, paid on the 46,707 square feet of usable third floor space.

Year	**Paid by Torstar to landlord for third floor**	**Paid to Torstar by subtenant for third floor**	**Profit (Loss)**
2012	1,334,927.58	699,943.32	(634,984.26)
2013	1,326,408.16	1,193,830.92	(132,577.24)
2014	1,254,976.10	1,142,920.29	(112,055.81)
2015	1,283,811.06	1,163,471.37	(120,339.69)
2016	1,319,854.76	1,178,884.68	(140,970.08)
2017	1,318,544.08	1,177,950.54	(140,593.54)
2018	1,348,034.38	1,198,968.69	(149,065.69)
2019	1,434,539.26	1,260,621.93	(173,917.33)
2020 (8 mo.)	1,011,844.96	879,959.88	(131,885.08)
		Torstar Profit (Loss) pre-cost deduction	(1,736,388.32)
		Torstar's additional sublease costs (not in dispute on appeal)	(878,992.00)
		Total Profit (Loss)	(2,615,380.72)

(Note: Amounts are exclusive of HST)

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The legal proceedings

[33] Pinnacle issued the Claim on June 1, 2020, seeking payment from Torstar of the alleged profits from the Boreal Sublease and two other subleases into which Torstar had entered. Pinnacle has since abandoned its allegations regarding the other two subleases. Consequently, I say nothing more about them.

[34] Torstar then brought its summary judgment motion seeking to dismiss Pinnacle's action and Pinnacle brought its cross-motion for summary judgment.

III. THE DECISION BELOW

The Initial Endorsement

[35] In an endorsement dated August 29, 2022 (the "**Initial Endorsement**"), the motion judge interpreted the words "net of all reasonable costs incurred by [Torstar] in connection therewith" in article 8.1 of the Lease. She found those words precluded Torstar from deducting the full third-floor rent it paid Pinnacle as a "reasonable cost" when determining whether Torstar had profited from the Boreal Sublease. However, she found that Torstar could deduct real estate commissions, legal fees, and the rent-free cost of the fixturing period associated with the Boreal Sublease as "reasonable costs".

The motion judge's interpretation of art. 8.1

[36] The motion judge began by finding that Torstar had never surrendered the third-floor Open Air Space before the Lease expired in August 2020 and that it paid

rent on the entire third floor of the Building (measuring 65, 534 square feet), for the entire term of the Lease.

[37] The motion judge stated that the purpose of art. 8.1 is “to prohibit Torstar from making a profit by subletting” and that art. 8.1 permits only costs that are “reasonable” to be deducted. She rejected Torstar’s position that it could deduct the rent it had paid Pinnacle for the third-floor Open Air Space because those costs were not “reasonable costs incurred” in connection with the Boreal Sublease.

[38] The motion judge said that, in entering into the Lease, the parties “did not intend that costs associated with [the third-floor Open Air Space] that Torstar chose not to sublease” would be a “a reasonable expense incurred in connection with” the sublease. In her view, such an interpretation would permit Torstar to circumvent the purpose of art. 8.1, to prevent a profit arising from a sublease. “Torstar chose to sublease a portion of the space it leases at a much higher price and deduct the amount of rent it pays to the landlord for the portion of the leased premises it still retained as a cost of the sublease.” She said that permitting Torstar to deduct costs associated with the third-floor Open Air Space is “inconsistent with the reasonable business expectations and the plain wording and purpose of Section 8.1”.

[39] The motion judge also found that the “appropriate and commercially sensible comparator” in determining whether Torstar made a profit from the Boreal

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Sublease was the amount Torstar paid on 46,707 square feet under the Lease compared to the amount Boreal paid for that same space under the Boreal Sublease.

Other reasonable costs

[40] Apart from its costs of rent for the third floor of the Building, Torstar claimed $878,992 as “reasonable costs” within the meaning of art. 8.1 of the Lease. This figure included the real estate commissions and legal fees that Torstar incurred in relation to the Boreal Sublease, as well as $299,976 for Boreal’s rent-free fixturing period.

[41] Pinnacle disputed the fixturing period cost but agreed the remaining $579,016 were “reasonable costs” to be deducted from the profit earned on the Boreal Sublease.

[42] The motion judge found that the real estate commissions and legal fees Torstar had incurred in relation to the Boreal Sublease could be deducted as “reasonable costs”. She also found that Torstar could deduct the fixturing costs as claimed. She noted that the Pinnacle witness had admitted that:

> (i) the practice in the commercial leasing industry is to allow a fixturing period that is rent free; (ii) in the case of the Subleases, Torstar still had to pay rent to Pinnacle for the spaces even though the subtenants were not being charged rent by Torstar; (iii) the only reason he excludes it as a cost is that it was incurred before the formal start of the Subleases; and, (iv) if the Subleases had commenced prior to the start of the fixturing period, the

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> fixturing periods would be recognized as costs of the Subleases.

The amended endorsement

[43] On January 24, 2023, the motion judge issued an amended endorsement to include the last line of a paragraph that had been inadvertently omitted from the Initial Endorsement.

The amended amended endorsement

[44] On its summary judgment motion, Torstar had maintained that Pinnacle's claim was statute-barred under the two-year limitation period in the *LA 2002*. It contended that Pinnacle's claim was reasonably discoverable when Pinnacle bought the Building in 2012 and assumed the Boreal Sublease.

[45] Pinnacle's position was that its Claim fell within the jurisdiction of the *RPLA* and, as a result, a six-year limitation period applied.

[46] The motion judge neglected to address the limitation period issue in the Initial Endorsement. The parties asked that she deal with it, and she did so by way of an eight-paragraph amended amended endorsement dated February 13, 2023.

[47] The motion judge's analysis of the limitation period issue is found in paragraphs 5 – 7 of that endorsement. Those paragraphs read as follows:

> [5] The payments to Pinnacle by Torstar are rent and net profits earned from a sublease are payable as "Additional Rent". I agree that the *RLPA* applies and that

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> Pinnacle's claims are subject to a six-year limitation period.
>
> [6] The breach of the Office Lease required Torstar to have earned a profit from the Subleases which it did not pay to Pinnacle. Costs incurred with respect to the Subleases would have to be deducted from the monthly rent received pursuant to the Subleases.
>
> [7] I agree and find that the earliest date at which Torstar could have realized a profit from the Boreal Sublease is in October of 2014. The earliest date that the limitation period could expire is in the month of October 2020. This Action was commenced on June 1, 2020, with the six-year limitation period.

The oral directions

[48] At para. 38 of the Initial Endorsement, the motion judge directed the parties as follows:

> The reasonable costs can be deducted from the rent paid to Torstar pursuant to the subleases. To determine if Torstar profited in connection with the sublease, the rent received for the actual square footage subleased is compared to that same square footage lease to Pinnacle. From that amount, Torstar may deduct the amount that I have found to be reasonable costs, pursuant to the Lease. Should there be any profit, this amount must be paid as additional rent by Torstar to Pinnacle, with pre- and post-judgment interest.

[49] Disputes between the parties arose when they attempted to calculate the amounts owing in accordance with that direction. They returned to the motion judge for assistance. She gave oral directions settling the monetary value of the Judgment in which she disallowed Boreal's five-month rent-free period from Torstar's reasonable costs.

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IV. THE ISSUES ON APPEAL

[50] Torstar submits the motion judge erred in:

1. failing to interpret the words of the Lease and Boreal Sublease in their plain meaning, in harmony with the contracts as a whole and with the purpose of art. 8.1 of the Lease;
2. failing to interpret the contracts in a manner consistent with the factual matrix and the parties' commercial expectations;
3. applying the six-year limitation period in the *RPLA* rather than the two-year limitation period in the *LA 2002*; and
4. rejecting Boreal's five-month rent-free period as a reasonable cost incurred by Torstar.

V. STANDARD OF REVIEW

[51] The first, second, and fourth issues involve the interpretation of the Lease and the Boreal Sublease. As neither document is a standard form contract, this court must review the motion judge's interpretation of those contracts in accordance with the dictates of *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 52-53. In *Sattva*, the Supreme Court of Canada explained that because the interpretation of a contract involves questions of mixed fact and law, absent an extricable question of law which attracts a correctness standard, the standard of review is palpable and overriding error: at

paras. 50, 53. See also *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.*, 2024 SCC 20, 492 D.L.R. (4th) 389, at paras. 27-28.

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[52] Extricable errors of law in contract interpretation include the application of an incorrect legal principle, the failure to consider a required element of a legal test, and the failure to consider a relevant factor: *Sattva*, at para. 53. This court has identified other extricable errors of law, such as the failure to properly, accurately, and fully consider the context in which a contract was made, and the failure to consider the contract as a whole by focusing on one provision without giving proper consideration to other relevant provisions: *Fuller v. Aphria Inc.*, 2020 ONCA 403, 4 B.L.R. (6th) 161, at para. 50.

[53] The standard of review on the third issue, however, is correctness, because the question of which limitation period applies is a pure question of law: *Northwinds Brewery Ltd. v. Caralyse Inc.*, 2023 ONCA 17, 53 R.P.R. (6th) 29, at para. 22. Thus, the motion judge must have correctly decided that the *RPLA* applies to the Claim. If not correct, this court must intervene and apply the correct limitation period.

ISSUES 1 AND 2: THE MOTION JUDGE ERRED IN HER INTERPRETATION OF ART. 8.1 OF THE LEASE

[54] As both issues 1 and 2 require consideration of alleged errors in the motion judge's interpretation of art. 8.1, I will deal with them together.

[55] Recall that art. 8.1 of the Lease required Torstar to pay Pinnacle:

> Any profit (net of all reasonable costs incurred by [Torstar] in connection therewith) earned by [Torstar] in … subletting … any part of the Premises…shall be paid … as Additional Rent.

[56] The overriding issue in this case is whether Torstar could deduct, as “reasonable costs”, the full rent it paid Pinnacle for the third floor of the Building, for the purpose of determining whether it made a profit from the Boreal Sublease (the “**Overriding Issue**”).

[57] The motion judge interpreted art. 8.1 as precluding Torstar from making that deduction. In my view, she erred in law in three ways in that interpretation. First, the motion judge failed to interpret the Boreal Sublease in a manner consistent with the factual matrix. Second, she failed to consider the Boreal Sublease as a whole when deciding whether the sublet premises consisted of the full third floor of the Building. Third, her interpretation results in a commercial absurdity.

[58] In light of these legal errors, it falls to this court to interpret the contracts and decide the Overriding Issue. Before doing so, I set out the legal principles for interpreting legal contracts.

The governing legal principles

[59] *Sattva* is the seminal case on the modern approach to interpreting contracts. At para. 47 of *Sattva*, the Supreme Court provides the following guidance. The modern approach to interpreting contracts is rooted in practicalities and common-

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sense; it is “not dominated by technical rules of construction”. The court’s overriding concern is to determine the intent of the parties and the scope of their understanding. This requires the court “to 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”. Consideration of the surrounding circumstances – often referred to as the “factual matrix” – “recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning”.

[60] Further, commercial contacts must be interpreted in accordance with commercial reasonableness, sound commercial principles, and good business sense, and in a manner that “avoids a commercial absurdity”: *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205, at para. 24; *Ontario Securities Commission v. Bridging Finance Inc.*, 2023 ONCA 769, 169 O.R. (3d) 109, at para. 21.

The factual matrix

[61] The role and nature of the factual matrix in interpreting the terms of a contract are described as follows at paras. 57-58 of *Sattva*. The interpretation of a contract must always be grounded in the text and read in light of the entire contract. However, the terms of the contract are not to be read in isolation. In furtherance of

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the court's goal of understanding the mutual and objective intentions of the parties as expressed in the contract, the factual matrix must be considered when construing contractual provisions. The factual matrix should consist only of objective evidence of the background facts at the time of the execution of the contract – knowledge that was, or reasonably ought to have been, known by both parties at or before the date of contracting. As noted above, the Supreme Court emphasized the need to always consider the factual matrix when construing contractual provisions "because words alone do not have an immutable or absolute meaning": *Sattva*, at para. 47.

[62] While the motion judge set out the factual background at various points in the Initial Endorsement, she failed to identify the objective evidence known by Torstar and Boreal when they entered into the Boreal Sublease. Consequently, she failed to consider the factual matrix when interpreting the Boreal Sublease. Having failed to properly, accurately, and fully consider the factual context in which the Boreal Sublease was made, she erred in law: *Sattva*, at para. 47; *Fuller*, at para. 50.

[63] Although art. 8.1 is contained in the Lease, a consideration of that article alone is insufficient to resolve the Overriding Issue. Torstar's "reasonable costs" incurred in connection with the premises it sublet to Boreal necessarily engages a consideration of the Boreal Sublease. The Boreal Sublease must be construed as a whole, in light of its factual matrix, to determine whether the sublet premises

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consisted of the entire third floor of the Building or only the usable part of the third floor in the Office Tower.

[64] The factual matrix when Torstar and Boreal entered into the Boreal Sublease on July 1, 2011, includes the following. A year prior, in July of 2010, Torstar's sublease to Canada Post expired and Torstar surrendered the first and second floors of the Warehouse to the Original Landlord. As a result, Torstar knew the third-floor Open Air Space was under the landlord's sole control and neither it nor Boreal could access that space or use it.

[65] Further, Torstar knew or can reasonably be assumed to have known of the financial significance to it of art. 8.1 of the Lease when it entered into the Boreal Sublease.

[66] As well, despite having surrendered the first and second floors of the Warehouse to the Original Landlord in 2010, Torstar knew when it entered into the Boreal Sublease of its continuing obligation to pay rent to the landlord on the full third floor of the Building, which included the third-floor Open Air Space in the Warehouse. This obligation arose from art. 1.4 of the Lease which states that the third floor Rentable Area in the Building is 65,534 square feet. It is confirmed by the floor plan for the third floor attached to the Lease as a schedule which shows that square footage consists of both the usable third floor space in the Office

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Building and the unusable third-floor Open Air Space in the Warehouse, marked with an “X” across it.

[67] As I discuss more fully below, in light of the factual matrix, it made no commercial sense for Torstar to sublet only the usable third-floor space.

Failure to consider the whole of the Boreal Sublease in light of the factual matrix

[68] There is no dispute between the parties that the overall intent of art. 8.1 is to require Torstar to pay, to the landlord, any net profit it made on a sublease. To decide the Overriding Issue, however, the motion judge had to answer two questions: (1) what does “profit” mean for the purposes of art. 8.1; and (2) could Torstar deduct the full rental costs it paid for the third floor of the Building as reasonable costs incurred in connection with the Boreal Sublease?

[69] The motion judge did not address the first question. I do so in the section below on commercial reasonableness. It is sufficient at this point to say that profit should be given its ordinary meaning of the excess of revenue over the expenses incurred in obtaining that revenue.

[70] To answer the second question, the court had to consider the Boreal Sublease as a whole, in light of the factual matrix. The motion judge did not do that, thereby falling into legal error.

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[71] I pause to note that the motion judge made a palpable and overriding error in respect of the Boreal Sublease. At para. 19 of the Initial Endorsement, she states that the floor plan attached to the Boreal Sublease “omits the [third floor Open Air Space]”. That is a palpable error. The floor plans for the Lease and Boreal Sublease, attached to these reasons as Schedules A and B, both show the full third floor of the Building, consisting of the usable third floor space in the Office Tower and the unusable space in the third floor Open Air Space with an “X” through it. This factual error was overriding because the motion judge relied on it when finding that Torstar did not sublease the whole of the third floor to Boreal.

[72] I turn now to consider the Boreal Sublease as a whole, in light of the factual matrix.

[73] Recital A to the Boreal Sublease is set out below. In it, “Premises” is defined as those parts of the Building that Torstar leased under the Lease. The list includes the “3rd Floor” of the Building.

> Pursuant to an amended and restated office lease (the “Head Lease”) made as of 22^{m} day of August, 2000, between 1428501 Ontario Limited (the “Head Landlord”) and Torstar, the Head Landlord leased to Torstar certain premises being the Basement, Floor, 2^{m} Floor, 3rd Floor, 4^{tl} Floor, 5^{ti} Floor, 6th Floor, 7^{tl} Floor, 9th Floor and 10^{t}) Floor (the “Premises”), in the building municipally known as 1 Yonge Street, Toronto, Ontario, as more particularly

> described in the Head Lease (the "Building");[1] [Emphasis added]

[74] Recital C is a key provision for deciding the Overriding Issue so the relevant parts of it are set out again below:

> … Torstar … agree[s] to sublease to [Boreal] and [Boreal] agrees to sublease commencing January 1, 2012 that part of the Premises outlined in red on Schedule "A" such part being the entire 3rd Floor of the Building and comprising an area of approximately forty-six thousand seven hundred and seven square feet (46,707 sq. ft.) (the Sublet Premises") for part of the remainder of the term of the Head Lease on the terms and conditions contained herein. The parties agree that the area of the Sublet Premises has been deemed to be forty-six thousand seven hundred and seven square feet (46707 sq. ft.) (the "Deemed Rentable Area) and shall not be subject to re-adjustment by any of the parties hereto; [Emphasis added.]

[75] The third-floor plan referred to in recital C is attached to the Boreal Sublease. Although its orientation differs from that of the floor plan for the third floor attached to the Lease, the footprints are identical. Both third floor plans show the full third-floor space in the Building – the usable space in the Office Tower and the unusable third-floor Open Air Space with an "X" across it.

[76] Articles 1 and 6 of the Boreal Sublease are also relevant when deciding whether the sublet premises consisted of the full third floor of the Building or only

[1] This wording is drawn directly from recital A to the Boreal Sublease. It appears to contain a number of typographical errors in it. I do not see anything as turning on those apparent typographical errors.

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the usable part in the Office Tower. Article 1 directs that defined words in the Boreal Sublease are to be given the same meaning as provided in the Lease "except as provided herein". Under art. 6(i), Boreal covenanted to pay basic rent calculated on the "Deemed Rentable Area" of the sublet premises and under art. 6(ii) it covenanted to pay its proportionate share of Additional Rent.

[77] When the recitals and the relevant provisions of the Boreal Sublease are interpreted in light of the factual matrix, in my view, the sublet premises are the full third floor of the Building, with rent to be calculated based on the usable portion of the third floor.

[78] I acknowledge that the first sentence in recital C creates some ambiguity. It states that Torstar and Boreal agree that Boreal will sublease "that part of the Premises outlined in red on Schedule 'A' such part being the entire 3rd Floor of the Building". The ambiguity arises because the portion of the third-floor space outlined in red was the usable space in the Office Tower – but immediately thereafter, the sublet premises are described as "being the entire 3rd Floor of the Building". In my view, the balance of recital C resolves this ambiguity by stating that the parties "agree that the area of the Sublet Premises has been deemed to be forty-six thousand seven hundred and seven square feet (46,707 sq. ft.) (the 'Deemed Rentable Area')" (emphasis added). In other words, the sublet space was the full third floor of the Building, but the parties deemed it to be only the 46,707 square feet of usable space in the Office Tower.

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[79] This interpretation accords with the floor plan attached to the Boreal Sublease, which has the same footprint as the floor plan appended to the Lease; both show the full third floor of the Building.

[80] It also accords with art. 1 of the Boreal Sublease, which provides that defined terms in it shall have the same meaning at ascribed to them in the Lease. In the Lease, the third floor of the Building is defined as the full third floor space, both the usable and unusable parts of it.

[81] A consideration of the surrounding circumstances supports this interpretation. At the time the Boreal Sublease was formed, Torstar knew that it was obliged to pay rent to the landlord based on the full third floor of the Building. It also knew that neither it nor the sub-lessee would have access to, or use of, the third-floor Open Air Space. Torstar further knew that art. 8.1 gave it the right to sublease the full third floor of the Building but required that it pay the landlord any profit it earned in subletting premises, net of reasonable costs, incurred in connection with the sublease. In light of these surrounding circumstances, it makes no commercial sense that Torstar intended to sublet only the usable third-floor space.

[82] A consideration of the meaning of the word “profit” in art. 8. 1 and an analysis of the commercial realities reinforces this interpretation.

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A commercially absurd result

[83] As noted above, commercial contracts must be interpreted in accordance with commercial reasonableness and good business sense: *Ventas*, at para. 24. Interpretation of commercial contracts is to be rooted in common sense and practicality, not dominated by technical rules of construction: *Sattva*, at para. 47. In my view, the motion judge's interpretation runs afoul of these legal principles and results in commercial absurdity. Three points make this clear.

[84] First, the motion judge took an overly technical approach when determining whether Boreal subleased the full third floor of the Building. She focused on the fact that rent under the Boreal Sublease was calculated based on the square footage of the usable third floor space and not on the entire third floor space. However, this interpretation ignores the factual matrix and the practicalities of the situation.

[85] Torstar was obliged to pay the landlord rent for the full third floor of the Building. The technical difference between the Boreal Sublease of the "entire third floor" and Torstar's own Lease of the third floor is that Boreal paid Torstar rent calculated at a higher rental amount per square foot but only on the lower deemed square footage which reflected the usable area of the third floor.

[86] Torstar could have received the same amount of rent under the Boreal Sublease by simply using a lower cost per square foot cost but calculated on the

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full third floor. Had that been done, it is undeniable that Torstar could have deducted the full rent it paid Pinnacle as reasonable costs incurred in connection with the Boreal Sublease. In the circumstances of this case, the motion judge's focus on the fact that rent under the Boreal Sublease was calculated on only the usable third floor space is overly technical and offends common sense and practicality.

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[87] Second, it is commercially absurd to interpret the word "profit" in art. 8. 1 to require Torstar to pay Pinnacle over $1.1 million for subleasing space when Torstar actually incurred a $2.6 million loss on the sublet premises.

[88] "Profit" is not defined in the Lease. Thus, it is to be given its ordinary and grammatical meaning, so long as that meaning is consistent with the surrounding circumstances known to the parties at the time of formation of the Lease: *Sattva*, at para. 47. The meaning of profit in the caselaw accords with its ordinary dictionary meaning. I see nothing in the factual matrix to suggest it should be given any other meaning.

[89] Profit is determined by setting against revenues, the expenses incurred in earning income: *Canderel Ltd. v. R*, [1998] 1 S.C.R. 147, 155 DLR (4th) 257, at para. 53. Although this meaning of profit was given in the context of determining a taxpayer's profit, it accords with the dictionary definition of profit as "the excess of returns over expenditure in a transaction or series of transactions": Merriam-

Webster Dictionary, online: https://www.merriam-webster.com/dictionary/profit, retrieved on September 6, 2024.

[90] Torstar was obliged to pay Pinnacle rent on the full third floor of the Building. It did so. Torstar paid more rent for the third floor than it received in rent under the Boreal Sublease. Therefore, Torstar not only had no "excess of returns over expenditure" in these transactions, it lost $2.6 million as a result of them. In short, Torstar made no profit within the meaning of art. 8.1.

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[91] Third, the motion judge's interpretation would give Pinnacle an unintended windfall. During the term of the Boreal Sublease, the third-floor Open Air Space was under Pinnacle's sole control. Neither Torstar nor Boreal could access or use it. Pinnacle's sole control is underscored by the fact that it never sought Torstar's consent when renting out the Warehouse, which includes the third-floor Open Air Space.

[92] Only Pinnacle could benefit from the third-floor Open Air Space during the term of the Boreal Sublease – and it did. From the outset of its ownership of the Building in 2012, Pinnacle has rented the Warehouse (which includes the third-floor Open Air Space) to third parties. Thus, in addition to receiving full rent for the entire third floor of the Building from Torstar, Pinnacle received rental income from third parties who used the Warehouse during the sublease period. On the motion judge's interpretation, Pinnacle would receive a further $1.1 million from Torstar,

despite Pinnacle having received income twice over for the space in question. This offends the notions of commercial reasonableness and good business sense.

[93] The motion judge's failure to conduct a proper commercial reasonableness analysis, informed by the factual matrix, led to a commercially absurd result that includes a windfall to the landlord in the face of non-existent profits. The parties could not have intended that art. 8.1 would have this effect when they included it in the Lease.

[94] Accordingly, the court below should have granted Torstar's motion and dismissed the Claim.

[95] I have had the benefit of reading my colleague's dissenting reasons in which he notes that these reasons do not consider the effect of the Lease's surrender rights when interpreting the Lease or the Boreal Sublease. There are two reasons for that.

[96] First, the parties did not plead surrender as an issue or as a matter going to the interpretation of art. 8.1. Surrender arose in these proceedings only in the context of Torstar's contention that it surrendered the third-floor Open Air Space to the Original Landlord in July 2010 when it surrendered the first and second floors of the Warehouse. The motion judge rejected Torstar's contention, finding that Torstar had not surrendered the third-floor Open Air Space at that time (or otherwise). On appeal, the parties similarly did not argue that surrender – or the

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surrender provisions in the Lease – went to the interpretation of art. 8.1. Stepping outside of the pleadings and the case as developed by the parties raises fairness considerations: *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (Ont. C.A.), at paras. 60-62.

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[97] Second, the surrender provisions in the Lease do not bear on the issue for resolution in this case, namely, whether Torstar was entitled to deduct the full rent it paid Pinnacle for the third floor of the Building (including the third-floor Open Air Space) as "reasonable costs" incurred in connection with the Boreal Sublease. There was no dispute that Torstar paid rent on the full third floor of the Building throughout the life of the Lease. There was no dispute that Torstar had no access to, or use of, the Warehouse since Pinnacle acquired the Building in 2012. There was no dispute that, when entering the Boreal Sublease, both Torstar and Boreal knew that they could not access or use the third-floor Open Air Space because that space was under Pinnacle's sole control.

[98] In deciding the issue, this court had to interpret the Boreal Sublease to determine whether, under its terms, Torstar and Boreal had agreed that Boreal would: (1) sublease the entire third floor of the Building but pay rent based on only the usable space in the Office Tower; or (2) sublease and pay rent on only the usable space in the Office Tower. The surrender provisions in the Lease do not bear on that matter. Article 2 of Schedule D of the Lease governs Torstar's right to surrender certain portions of the Premises, at certain times, to Pinnacle. Article 3

of Schedule D deals with Torstar's surrender obligations on the termination of the Canada Post sublease. And art. 4 of Schedule D governs Torstar's general surrender right, providing that it could only surrender to Pinnacle any portion of the Premises in accordance with the terms of the Lease (i.e. art. 2 of Schedule D) or with the Landlord's specific consent. In short, the surrender provisions in the Lease govern Torstar's rights of surrender to Pinnacle, as the landlord. They do not assist in interpreting art. 8.1 of the Lease nor do they assist in interpreting the Boreal Sublease.

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ISSUE 3: THE *LA 2002* APPLIES TO THE CLAIM FOR NET PROFIT UNDER ART. 8.1

[99] The motion judge concluded that the *RPLA* applied to Pinnacle's claim for net "profit" under art. 8. 1 of the Lease because "the payments to Pinnacle by Torstar are rent and net profits earned from a sublease are payable as Additional Rent". As a result, she found that the Claim was subject to a six-year limitation period.

[100] In my view, the jurisprudence of this court makes it clear that the motion judge erred in so concluding. The Claim is not based on an obligation to pay "rent", as that term is defined in the *RPLA*. Rather, the Claim is for an alleged breach of a term of the Lease that is governed by the *LA 2002*. Accordingly, it is subject to a two-year limitation period.

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[101] Section 17(1) of the *RPLA* provides that “no arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent…shall be recovered by any…action but within six years next after the same respectively has become due”. “Rent” is defined in s. 1 the *RPLA* to include “all annuities and periodical sums of money charged upon or payable out of land”.

[102] In *Pickering Square Inc. v. Trillium College Inc.*, 2014 ONSC 2629, 44 R.P.R. (5th) 251, aff’d on other grounds, 2016 ONCA 179, 395 D.L.R. (4th) 679, Mew J. observed that the word “rent” in s. 17 of the *RPLA* means a payment due under a lease between a tenant and landlord as compensation for the use of land and premises: at para. 36. He explained that it does not depend on whether the parties to the lease define a matter as “rent”. Rather, the obligation must be interpreted in light of the context, scheme, and object of the *RPLA*, and the law of limitations in Ontario: at para. 52. Otherwise, every amount payable to the landlord under the lease is to be treated as rent: para. 39.

[103] At paras. 24-27 of *Pickering Square*, Mew J. explains that the application of the *LA 2002* should be construed broadly and that of the *RPLA* narrowly because with the enactment of the *LA 2002* “the legislature created a single, comprehensive general limitations law that is to apply to all claims for injury, loss or damages except, in relevant part, when the *RPLA* specifically applies”. Determining whether a matter is “rent” within the meaning of the *RPLA*, by reference solely to the words used by the parties, would defeat the legislative purpose behind the *LA 2002*. The

word “rent” in the *RPLA* has an objective meaning that parties cannot nullify by contract: at para. 40.

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[104] Justice Mew went on to find that Pickering’s claim against Trillium for breach of covenant to operate its business continuously on the leased premises was governed by the *LA 2002*: at para. 56.

[105] An appeal to this court was taken on some aspects of the first instance decision in *Pickering Square* but no challenge was made to the applicability of the *LA 2002*. Indeed, there is nothing in this court’s *Pickering Square* decision that questions the applicability of the *LA 2002*. To the contrary, the court applied the *LA 2002* in deciding such matters as when the limitation period began to run and whether certain obligations under the lease in question were statute barred.

[106] In *Northwinds Brewery*, this court quoted with approval Mew J.’s discussion of the meaning of rent in s. 17(1). It reversed the first instance decision and found that the *RPLA* applied to monthly payments by the tenant for exclusive occupation of a shed area because the payments “fit neatly” within the *RPLA*’s definition of “rent”, as they constituted “periodical sums of money charged upon or payable out of land”: at para. 25.

[107] However, *Northwinds Brewery* is factually very different than this case. The obligation to remit net profit under art. 8.1 of the Lease was not an “annuity” nor was it a “periodical sum of money charged upon or payable out of land”. Rather,

Torstar was obliged to pay the landlord net “profit”, a variable amount calculated by reference to a formula in art. 8.1 which permitted Torstar to deduct “reasonable expenses” such as legal fees and real estate commissions from Torstar’s earnings from the sublease. Thus, even though art. 8.1 labelled the net profit Torstar was to pay the landlord as “Additional Rent”, that obligation was not to pay “rent”, within the meaning of s. 17(1) of the *RPLA*.

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[108] The parties to this appeal raise questions about when the limitation period began to run, and whether a rolling limitation period would be appropriate in this case. I decline to answer these questions for two reasons. First, given my interpretation of art. 8.1, they need not be answered. Second, the importance of these questions leads me to conclude they are best answered when they have been thoroughly argued and decided at first instance, with the necessary factual findings having been made. That is not this case.

ISSUE 4: THE COSTS OF THE 5-MONTH RENT-FREE PERIOD

[109] As I explain above, in my view, Torstar was entitled to deduct its full third-floor rental costs from the money it earned under the Boreal Sublease. When that is done, it is clear that rather than profiting from the Boreal Sublease, Torstar incurred a $2.6 million loss on the third-floor premises. Consequently, it is unnecessary to decide the fourth issue and I decline to do so.

VI. DISPOSITION

[110] Accordingly, I would set aside the Judgment, order that Torstar's summary judgment motion be granted, and dismiss Pinnacle's cross motion for summary judgment. I would also order Pinnacle to pay Torstar costs of the action, the motions, and this appeal. I would fix the costs of the appeal in the agreed-on sum of $25,000, all-inclusive.

[111] If the parties are unable to agree on the costs of the action and motions, I would permit them to file written submissions to a maximum of four pages, with this court, no later than seven days from the date of release of this decision. I would direct the parties to attach, to their submissions, their Bills of Costs for the action and the motions, and any attendant written submissions.

"E.E. Gillese J.A."
"I agree. Sossin J.A."

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Brown J.A. (dissenting):

I. OVERVIEW

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[112] With respect, I cannot agree with my colleagues' proposed disposition of this appeal.

[113] A decade ago in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, the Supreme Court of Canada initiated a sea-change in the approach provincial appellate courts should take when reviewing a lower court's interpretation of a contract. Prior to *Sattva*, determining the legal rights and obligations of the parties under a written contract was generally considered a question of law. Under such an approach, as a practical matter if an appellate court disagreed with the lower court's interpretation of a contract, the appellate court would feel free to substitute its own interpretation.

[114] *Sattva* sought to change that historical approach by holding, at para. 50, that contractual interpretation involves issues of mixed fact and law. That re-characterization of the issue sought to narrow the circumstances in which an appellate court could substitute its interpretation of a contract for that of a lower court. As put in *Sattva* at para. 51:

> One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law,

> rather than in providing a new forum for parties to continue their private litigation. For this reason, *Southam Inc.*[2] identified the degree of generality (or "precedential value") as the key difference between a question of law and a question of mixed fact and law. [Emphasis added.]

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[115] *Sattva* did not close the door completely on the possibility that an appellate court might discern a question of law embedded within an issue of contractual interpretation to which it could apply a correctness standard of review. According to *Sattva*, such extricable legal errors made in the course of contractual interpretation could "include 'the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor'": *Sattva*, at para. 53. As well, the court recognized an exception to *Sattva's* deferential approach when the issue involves the interpretation of a standard form contract; in those circumstances, the appropriate standard of review remains correctness: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23.

[116] Nevertheless, *Sattva* cautioned appellate courts against searching out extricable questions of law in contract interpretation disputes. As stated in *Sattva*, "the circumstances in which a question of law can be extricated from the interpretation process will be rare": at para. 55. The court repeated this admonition

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[2] *Canada (Director of Investigation and Research) v. Southam Inc.*, 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748.

in *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688, at paras. 63 and 65.

[117] A few months ago, in *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.*, 2024 SCC 20, 492 D.L.R. (4th) 389, the Supreme Court of Canada revisited the issue of the scope of appellate review for issues of contract interpretation. Assessing the implementation of *Sattva* by appellate courts over the course of this past decade, the Supreme Court expressed displeasure at the approach taken by some appellate courts to search for an extricable issue of law in a dispute involving contractual interpretation. As stated at para. 28 of *Earthco*:

> The search for an extricable question of law is, in my view, not consistent with *Sattva*'s holding that the interpretation of contracts and agreements are mixed questions of law and fact and that extricable questions of law will be "rare" and "uncommon"… *Housen*[3] expressly admonished that courts should "be cautious in identifying extricable questions of law in disputes over contractual interpretation" because ascertaining the objective intention of the parties, which is the prevailing goal of contractual interpretation, is an "inherently fact specific" exercise … The subsequent tendency of some appellate courts to use *Sattva* to elevate the standard of review, when it was intended to do the opposite, is to be resisted. [Citations omitted.]

[118] In the present case, the amended and restated August 22, 2000 lease between Torstar Corporation ("Torstar") and its landlord, 1428501 Ontario Limited

[3] *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235

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(“142 Ontario”), (the “Lease”) of the building located at One Yonge Street, Toronto (the “Building”) and the subsequent July 2011 Sublease between Torstar and Collège Boréal D’Arts Appliqués Et De Technologie (“Boreal”) (the “Boreal Sublease”) for a portion of the Building’s third-floor space lie solidly at the bespoke-end of the contract interpretation spectrum. Their interpretation involves no question of precedential value that “can be expected to have an impact beyond the parties to the particular dispute”: *Sattva*, at para. 51. Consequently, and with the greatest of respect for my colleagues, their interpretation of both contracts runs afoul of the caution voiced by the Supreme Court in *Sattva*, *Teal Cedar*, and *Earthco* against embarking on a search for an extricable question of law. I do not share my colleagues’ view that appellate intervention is justified in the circumstances of these contracts. As well, I take a different view of the record than my colleagues, which leads me to affirm, not set aside, the motion judge’s interpretation of art. 8.1 of the Lease and Recital C of the Boreal Sublease.

[119] Instead, I would dismiss Torstar’s appeal for the following reasons:

(i) The motion judge did not err in interpreting art. 8.1 of the Lease as precluding Torstar from including in its calculation of “profit” the rent it paid to Pinnacle International (One Yonge) Ltd. (“Pinnacle”) for open-air space on the third floor of the “podium” or “atrium” portion of the Building that it did not sublease under the 2011 Boreal Sublease;

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(ii) The motion judge did not err by excluding the five-month rent-free period at the start of the term of the Boreal Sublease from the art. 8.1 calculation of “profit”; and

(iii) The motion judge did not err in finding that the *Real Property Limitations Act*, R.S.O. 1990, c. L.15 (“*RPLA*”), applied to Pinnacle’s claim not the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B (“*Limitations Act*”).

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[120] Finally, I would not entertain the new argument Torstar seeks to raise on this appeal by way of an alternative submission that involves *RPLA* s. 2, which states: “Nothing in this Act interferes with any rule of equity in refusing relief on the ground of acquiescence, or otherwise, to any person whose right to bring an action is not barred by virtue of this Act.”

[121] Torstar contends that if the *RPLA* applies to Pinnacle’s claim, the motion judge erred by failing to find that *RPLA* s. 2 should estop Pinnacle “from proceeding with a retroactive claim for arrears of damages in circumstances where it acquiesced to the alleged breach for years, including during lease extension negotiations.” In my view, this submission does not meet the criteria for consideration of a new argument raised for the first time on appeal.

[122] Consequently, I would dismiss Torstar’s appeal.

II. FIRST ISSUE: INTERPRETING THE LEASE AND BOREAL SUBLEASE

A. The interpretation issue stated

[123] The dispute between Pinnacle and Torstar can be simply stated.

[124] Torstar paid Pinnacle $2.18 to $2.40 per square foot in Basic Rent for the third-floor space it leased.[4] Boreal paid Torstar $7.50 per square foot[5] in Basic Rent.[6] Pinnacle takes the position that by receiving from Boreal a higher rent than it paid to its landlord, Torstar earned a "profit" on the sublet space within the meaning of art. 8.1 of the Lease. Therefore, Torstar was required to pay the difference to Pinnacle.

[125] Torstar disagrees. It contends that while Boreal only used the office part of the Building's third-floor space and not the third-floor open-air warehouse space, a proper interpretation of the Boreal Sublease and the application of commercial common sense allows Torstar to claim, as "reasonable costs incurred by [Torstar] in connection" with subletting space to Boreal the rent, or cost, Torstar paid to Pinnacle under the Lease for the open-air third-floor warehouse space. Once that "cost" was recognized, Torstar takes the position that it did not earn any "profit" from the Boreal Sublease within the meaning of art. 8.1 of the Lease.

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[4] Lease, arts. 1.6, 1.7.
[5] Transcript of the Cross-examination of Raffaele Montone, QQ. 259-262. See also: Statement of Claim, para. 17.
[6] Boreal Sublease, art. 6(ii). Both Torstar and Boreal paid Additional Rent on an identical square foot basis.

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[126] The motion judge rejected Torstar's submission. She found that Torstar had never surrendered the third-floor open-air space before the expiry of the Lease in 2020 and had continued to pay Pinnacle rent for the open-air space after it entered into the Boreal Sublease: 2022 ONSC 4879, at para. 26. She interpreted the "profit" clause of art. 8.1 as requiring, in effect, an "apples to apples" comparison of the rent Torstar received for the office portion of the third-floor space sublet under the Boreal Sublease with the rent Torstar paid Pinnacle under the Lease for that same amount of space. The motion judge reasoned:

> [20] The purpose of Section 8.1 is to prohibit Torstar from making a profit by subletting. Section 8.1 permits only costs that are "reasonable" to be deducted. The term "reasonable" must be given appropriate consideration.
>
> [21] I find that Torstar's position of deducting the costs of basic and Additional Rent associated with the Atrium Space cannot be accepted, as that space was not leased to Boreal. The costs are not "reasonable cost incurred" *in connection with* the Boreal Sublease within the meaning of Section 8.1 of the Office Lease. These costs are not "reasonable".
>
> [22] Torstar's submission is based on the language of the Boreal Sublease to suggest that, because the Boreal Sublease which states that as Boreal subleased the "entire third floor", the Atrium Space should be included in the profit calculation under Section 8.1 of the Lease. Further, because the landlord consented to the Boreal Sublease, it has agreed to this approach. I do not accept this submission.
>
> [23] I accept that in determining what the parties' intentions were in entering the Lease, the parties did not inten[d] that costs associated with portions of a floor (the Atrium) that Torstar chose not to sublease would be a

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> "reasonable expense incurred in connection with" a sublease. Such interpretation would permit Torstar to circumvent the purpose of Section 8.1, to prevent a profit arising from a sublease. Torstar chose to sublease a portion of the space it leases at a much higher price and deduct the amount of rent it pays to the landlord for the portion of leased premises it retained as a cost of the sublease. I am of the view that Torstar's interpretation is inconsistent with the reasonable business expectations and the plain wording and purpose of Section 8.1.
>
> …
>
> [25] Torstar's argument is based on an inappropriate comparison of rents paid by Torstar under the Lease for the total Third Floor area (65,534 square feet including the Atrium) and rents received by Torstar under the Boreal Sublease for a portion of the Third Floor (46,707 square feet) excluding the Atrium space. <u>The square footage of both leases was not the same. Torstar subleased only 46,707 square feet of the Third Floor and did not surrender the Atrium Space at any time over the Lease's term</u>.
>
> …
>
> [27] I find that the appropriate and commercially sensible comparator in determining whether a profit was made from the Boreal Sublease is the amount paid by Torstar on 46,707 square feet under the Lease and the amount paid for that same space under the Boreal Sublease (i.e. the square footage of the Third Floor less the Atrium Space). [Emphasis added.]

[127] Torstar's submission that the motion judge erred in her interpretation of the Lease boils down to the following proposition: in calculating the "profit" earned by Torstar on the Boreal Sublease for the purpose of art. 8.1 of the Lease, the rent Torstar paid Pinnacle on the open-air third-floor area had to be treated as a

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deductible "reasonable cost … in connection" with the Boreal Sublease. Torstar makes this point in a variety of ways:

(i) In its view, the motion judge's choice of the Boreal Sublease's Deemed Rentable Area of 46,707 square feet to conduct the comparison of the rent against the subrent instead of the "entire third floor" area amounted to improperly using a "technicality" without regard to the overall purpose of art. 8.1, which Torstar acknowledges seeks to ensure a tenant does not profit from a sublease. It also resulted in an inappropriate interpretation of the concept of "profit", which Torstar contends requires using the aggregate costs it incurred for the entire third floor;

(ii) Since the open-air third-floor space could not be rented out as office space or usable space, the rent Torstar paid Pinnacle for that space was necessarily a "reasonable cost" it incurred in subletting the usable office space to Boreal;

(iii) The motion judge's interpretation ignored that under the Boreal Sublease Torstar "was subletting the third floor on the exact same basis as Torstar was renting it";

(iv) The motion judge failed to properly consider an important part of the factual matrix, namely that the part of the third floor that was not sublet to Boreal consisted of "floorless air space above a warehouse" that "was not accessible to Torstar or its subtenant". In Torstar's view, had the

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motion judge considered this part of the factual matrix she could not have concluded that Torstar retained any third-floor space that did not constitute a “reasonable cost” of subletting; and

(v) The motion judge’s interpretation would result in a commercial absurdity since, as a practical matter, Torstar could not sublease the third-floor open-air space. Therefore, the rent it paid Pinnacle for that space must be treated as “reasonable cost” deductible in any art. 8.1 profit calculation.

[128] My colleagues are persuaded by Torstar’s submissions, concluding that the trial judge erred in the use she made of the “Deemed Rentable Area” in the recital to the Boreal Sublease and that the motion judge’s interpretation would result in a commercial absurdity.

[129] I see no commercial absurdity resulting from the motion judge’s interpretation. Indeed, I agree with her interpretation, especially when one takes into account the Lease’s treatment of surrender rights enjoyed by Torstar, a provision not considered by my colleagues. Nor do I see any extricable question of law in the motion judge’s interpretation of the Boreal Sublease recital.

B. The factual background to the August 2000 Lease

[130] Neither affiant put forward by the parties had personal knowledge of the circumstances that led to the Lease between 142 Ontario, as landlord, and Torstar,

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as tenant. Mr. Lorenzo DeMarchi filed affidavits on behalf of Torstar; his employment with the company went back to 2009. Pinnacle's affiant, Mr. Raffaele Montone, joined the company in 2019. Notwithstanding the absence of affiants with direct knowledge of the makings of the Lease, there was no dispute between the parties about certain key events that led up to the Lease.

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[131] As of the date of the Lease, the following history of the Building and its premises were known to Torstar and the original Landlord:

- In 1946, a predecessor corporation to Torstar acquired the One Yonge Street property;
- By 1971 Torstar leased the property to Olympia & York Developments Limited ("Olympia & York") which, in turn, sublet the property to Torstar in 1971;
- The Building was constructed on the property and occupied by Torstar in approximately 1971;
- As shown in the photograph reproduced at para. 9 of my colleagues' reasons, the Building is made up of an office tower and a podium;
- Part of the podium portion of the Building consists of a three-story warehouse space in which Torstar located its printing operations. (The parties refer to the portions of the warehouse space at the second and third-floor levels as "open air", "atrium", or "ghost" space);

- Torstar's printing presses operated in the three-story warehouse space from 1971 to 1992;
- In 1992, Torstar moved its printing operations to Vaughan, Ontario and removed its equipment from the warehouse space;
- In 1995, Torstar subleased parts of the first and second floor of the Building to Canada Post Corporation ("Canada Post"), including the first and second floor portions of the warehouse space in the podium (the "Canada Post Sublease").[7]
- The initial term of the Canada Post Sublease was for ten years; it was extended for a further five-year period and expired on July 31, 2010. The Canada Post Sublease for the first and second floor warehouse space was in place at the time of the Lease but expired before Torstar concluded the July 2011 Boreal Sublease;
- At some point, Olympia & York transferred its interest in the lands and Building to Torstar;
- In August 2000, Torstar sold the land to 142 Ontario Limited. In the context of that transaction, the previous sublease to Torstar was amended and restated by the Lease, signed August 22, 2000, between Torstar and 142 Ontario.

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[7] Lease, art. 1.4 and Schedule B-2.

[132] Accordingly, when Torstar entered into the Lease with 142 Ontario, its printing presses had been long gone from the Building's three-floor open-air warehouse space and it had only subleased the first two floors of that warehouse space to Canada Post, which still occupied that space at the time of the Lease. The record does not contain any evidence that Torstar had put the third-floor open-air warehouse space to any specific use after it had moved its printing presses to Vaughan.

[133] When Torstar entered into the Lease, the third-floor warehouse space already was "orphan" or "ghost" space. Nevertheless, in the Lease Torstar agreed to pay rent on that "orphan" space and agreed that it would not have a unilateral right to surrender that space to the Landlord. Both those commercial realities flowed from the plain language of the Lease.

[134] My colleagues contend that the motion judge failed to identify the objective evidence that constituted the material factual matrix. I disagree. The motion judge specifically found that Torstar never surrendered the third-floor atrium space before the expiry of the Lease in August 2020 and that it paid rent on the entire 65,534 square feet third-floor area stipulated in the lease until that time: 2022 ONSC 4879, at paras. 16 and 26. The motion judge also recognized that Torstar was contending that when it entered into the 2011 Boreal Sublease the third-floor "Open Air Space" was "unusable": at para. 12.

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C. The Demised Premises in the Lease

[135] The premises demised to Torstar under the Lease included the third-floor open-air space.

[136] Article 1.4 of the Lease defined the leased "Premises" as: "The space shown cross-hatched on Schedule 'B-1' of this Lease, located on the following floors of the Building and having a total Rentable Area of 499,516 square feet as follows …" Article 1.4 continued with a table that set out the "rentable area" for each floor of the building in respect of which rent would be paid. Article 1.4 described the rentable area for the Building's first five floors as follows:

Floor	Rentable Area (sq. ft.)
1st Floor	(115,174*) (Plant and Tower)
2nd Floor	(60,863*) (Plant and Tower (approximately 15,000 of which is Tower))
3rd Floor	(65,534) (Plant and Tower (approximately 15,000 of which is Tower))
4th Floor	(90,415) (Plant and Tower (approximately 15,000 of which is Tower))
5th Floor	(90,415) (Plant and Tower (approximately 15,000 of which is Tower)
	* the Tenant has sublet approximately 7,700 square meters of Rentable Area on the 1st floor of the Building and approximately 1,820 square meters of rentable Area on the 2nd floor of the Building to Canada Post Corporation pursuant to the Canada Post Sublease, in

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	the area shown cross-hatched on Schedule “B-2” to this Lease.

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[137] Two points need be made about the Lease’s description of the demised Premises.

[138] First, the Lease uses the concept of “rentable area”, not “usable space”, as the basis upon which to calculate rent. In my view, Torstar’s main submission essentially attempts to convert the agreed-upon concept of “rentable area” into “usable area”. In other words, Torstar is attempting to re-write the terms of the Lease.

[139] Second, as art. 1.4 stipulates, the “rentable area” for the first five floors of the Building included space in both the “Plant and Tower”. Although the Lease did not contain definitions of “plant” and “tower”, there is no dispute that the leased Building consisted of two parts: a “tower” that contained typical office space; and a six-storey “plant” (or “podium”), made up of three stories of open warehouse space initially used by Torstar for its printing presses, together with normal office space. The floor plans that made up Schedule “B-1” of the Lease clearly identified the rentable areas in the “plant” and “tower” areas of each relevant floor.

[140] The rentable area for the third floor included both tower and plant space.

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D. The rights to sublease and surrender in the Lease

[141] The Lease granted Torstar a broad right to sublet. The opening language of art. 8.1 provided that “[Torstar] shall have the right: … (ii) to sublet … all, or any part of the Premises upon notice to the Landlord.” The right to sublet was exercisable without consent for so long as Torstar maintained its “head office presence” in the Building.

[142] The Lease granted Torstar narrower cancellation or surrender privileges. One of the schedules that art. 1.11 of the Lease identified as forming part of the Lease was Schedule D, which contained “Additional Provisions”. Article 2 of Schedule D granted Torstar the right to surrender certain portions of the Premises during the term of the Lease. The distinction between “tower” and “plant” space played a role in the surrender rights granted to Torstar under the Lease, which stated that:

(i) Upon eight months’ written notice, Torstar could surrender portions of the Premises on the 5th, 7th, 9th and 10th floors “of <u>tower</u> portions of the Building” (emphasis added). Torstar subsequently exercised this right to surrender on several occasions;

(ii) After the 10th anniversary of the term commencement date (i.e. August 2010), Torstar had the right to surrender, upon eight months’ written

notice, portions of the "2nd, 3rd, 4th and 6th floors of tower portions of the Building" (emphasis added) as it determined in its discretion.[8]

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[143] As well, upon the expiry of the Canada Post Sublease, art. 3 of Schedule D to the Lease required Torstar to surrender to the Landlord that portion of the Premises that was the subject of the sublease – namely, first and second floor space, including warehouse space.

[144] However, for the purposes of this appeal it is important to note that the Lease did not grant Torstar the unilateral right to surrender the warehouse portion of the third floor as that portion of the space was not located in the "tower" portion of the Building. A surrender of that portion of the third floor would require "the specific consent of the Landlord", as set out in the general surrender provision contained in art. 4 of Schedule D. As I explain below at paras. 186 to 190, Torstar's lack of a unilateral right to surrender the third-floor warehouse space undercuts its contention that the motion judge's interpretation of the Lease and Boreal Sublease results in a commercial absurdity.

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[8] The Lease imposed certain space conditions on the amount of space that could be surrendered at one time. After Pinnacle acquired the Building in July 2012, Torstar exercised the unilateral right to surrender granted to it by art. 2 of Schedule D to the Lease on several occasions: August 2014, to surrender part of the 7th floor; January 2017, to surrender the entire 6th floor and part of the 7th floor; and April 2018, to surrender part of the 4th floor.

[145] My colleagues did not consider the effect of the Lease's surrender rights when interpreting the Lease and Boreal Sublease.

E. The Boreal Sublease recital

[146] Article 1.4 of the Lease provided that Torstar had leased the "Rentable Area" on the third floor of the premises consisting of 65,534 square feet "(Plant and Tower (approximately 15,000 of which is Tower))". Part of the "Rentable Area" was made up of open-air space at the third-floor level of the warehouse portion of the Building, while the rest was office space located in both the "Plant" and "Tower".

[147] By the July 2011 Boreal Sublease, Torstar subleased third-floor space to Boreal for a term running from January 1, 2012, until August 30, 2020. Recital C of the Boreal Sublease described the subleased space as "that part of the Premises outlined in red on Schedule 'A'". The recital continued by describing "such part being the entire 3rd floor of the Building and comprising an area of approximately forty-six thousand seven hundred and seven square feet (46,707 sq. ft.) (the Sublet Premises")". Recital C further stipulated that the parties agreed "the area of the Sublet Premises has been deemed to be forty-six thousand seven hundred and seven square feet (46707 sq. ft.) (the "Deemed Rentable Area")".

F. Analysis of Torstar's interpretation submissions

[148] Torstar submits that the motion judge's use of the Deemed Rentable Area of 46,707 square feet to compare the rent Torstar paid Pinnacle against the

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subrent Torstar received from Boreal was incorrect. She should have used the "entire third floor" area. Using the Deemed Rentable Area amounted to improperly using a "technicality" without regard to the overall purpose of art. 8.1, which Torstar acknowledges sought to ensure a tenant did not profit from a sublease. It also resulted in an inappropriate interpretation of the concept of "profit", which Torstar contends requires using the aggregate costs it incurred for the entire third floor.

[149] I am not persuaded by Torstar's submissions on this point.

[150] Torstar's appeal of the motion judge's interpretation of Recital C of the Boreal Sublease targets what is quintessentially the typical question of mixed fact and law that lies at the heart of most appeals from contractual interpretation decisions. The deferential standard of review applies.

[151] I am not persuaded that any palpable and overriding error taints the motion judge's interpretation of the definition of "Sublet Premises" in Recital C of the Boreal Sublease.

[152] As the Supreme Court observed in para 63 of *Earthco*, the actual words chosen by the parties to a contract are "central" to the interpretative analysis. Accordingly, they are the appropriate place to start appellate review.

[153] With respect to the Profit Clause in art. 8.1 of the Lease, Torstar does not dispute several important points:

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(i) the purpose of the Profit Clause in art. 8.1 is “aimed at ensuring that a tenant does not profit from a sublease”;

(ii) the clause requires calculating “profit” by using some sort of “apples to apples” comparison;

(iii) Boreal was not required to pay as rent anything more than the rent calculated for the area actually demised, which was described both in terms of its total area and in terms of the area marked out in red on the sketch attached to the sublease; and

(iv) Torstar was required to pay rent, calculated on the basis described in the Lease, which included a description of the total area for which rent would be calculated. In fact, Torstar paid that amount to Pinnacle as rent for the demised third floor during the entirety of the period covered by the Boreal Sublease.

Up to this point in the contract interpretation exercise, Torstar does not assert any error by the motion judge.

[154] The only interpretative dispute is a narrow one: in calculating the “profit” it earned for purposes of art. 8.1 of the Lease, can Torstar deduct the amount of rent it paid to Pinnacle for the additional third-floor open-air or warehouse space? Torstar contends art. 8.1 permits such a deduction; Pinnacle disagrees. The motion judge accepted Pinnacle’s position.

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[155] At its core, Torstar's contention that the motion judge erred in her application of art. 8.1 takes issue with the area of the premises that the motion judge plugged into the "apples to apples" comparison. Torstar's argument focuses on the language in the Boreal Sublease that described the area of the third floor subleased to Boreal.

[156] Art. 1.4 of the Lease, which described the "Premises" leased to Torstar, stipulated that the "Rentable Area" for the third floor was 65,534 square feet, consisting of "Plant and Tower (approximately 15,000 of which is Tower)". Recital C in the Boreal Sublease described the "Sublet Premises" as follows:

> Each of Torstar and TSNL agree to sublease to [Boreal] and [Boreal] agrees to sublease commencing January 1, 2012 that part of the Premises outlined in red on Schedule "A" such part being the entire 3rd floor of the Building and comprising an area of approximately forty-six thousand seven hundred and seven square feet (46,707 sq. ft.) (the Sublet Premises") for part of the remainder of the te[r]m of the Head Lease on the terms and conditions contained herein. The parties agree that the area of the Sublet Premises has been deemed to be forty-six thousand seven hundred and seven square feet (46707 sq. ft.) (the "Deemed Rentable Area") and shall not be subject to re-adjustment by any of the parties hereto. [Emphasis added.]

[157] Torstar, in several different ways, contends the motion judge erred by not using the rent it paid Pinnacle for the 65,534 square feet of the third floor for purposes of comparison with the rent it received from Boreal. Torstar contends the

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phrase “the entire 3rd floor of the Building” used in the description of the Sublet Premises in the Boreal Sublease dictates such an approach.

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[158] My colleagues accept Torstar’s submission. At para. 77 of their reasons, they conclude that under the Boreal Sublease “the sublet premises are the full third floor of the Building, with rent to be calculated based on the usable portion of the third floor.” They find that the motion judge made a factual error by finding that the third-floor open-air or warehouse space did not form part of the premises sublet to Boreal.

[159] I do not agree. With the greatest of respect to my colleagues, I read the record in quite a different way. In my respectful view, the motion judge’s finding accords with the record; theirs does not.

[160] I start with the description of the Sublet Premises in Recital C of the Boreal Sublease.

[161] First, the phrase “the entire 3rd floor of the Building” on which Torstar rests its submission and my colleagues their analysis cannot be read in isolation from the words that appear before and after it which, in turn, incorporate the floor plan sketches attached to the Boreal Sublease and Consent to Sublease that clearly set out the boundaries of the sublet premises.

[162] The words of demise in the Boreal Sublease are as follows:

> Each of Torstar and TSNL agree to sublease to [Boreal] and [Boreal] agrees to sublease commencing January 1, 2012 <u>that part of the Premises outlined in red on Schedule “A”</u> … [Emphasis added.]

[163] Those words of demise are followed by the phrase on which Torstar and my colleagues focus: “[S]uch part being the entire 3rd floor of the Building”.

[164] Schedule A outlines in red an area bounded by a solid line, which the legend on Schedule A describes as “usable area”. That is to say, Schedule A clearly identifies the sublet portion of the Building as the usable part of the third floor; the Sublet Premises did not include what the parties describe as the atrium, warehouse, or open-air space on the third floor.

[165] The amount of area on the third floor sublet to Boreal was clearly set out by the parties in the sentence that followed the words upon which Torstar relies. There, the parties specified: “The parties agree that the area of the Sublet Premises has been deemed to be forty-six thousand seven hundred and seven square feet (46707 sq. ft.) (the ‘Deemed Rentable Area’) and shall not be subject to re-adjustment by any of the parties hereto.” Why the parties included in Recital C a “deemed” rentable area after they already had agreed that the subleased area comprised “an area of approximately forty-six thousand seven hundred square feet” was not clarified in the record. One could speculate that including a “deemed” rentable area that would “not be subject to re-adjustment by any of the parties hereto” sought to prevent one party from pulling out a measuring tape post-

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execution in an effort to alter the sublet area on which rent was payable. In any event, the inclusion of a "Deemed Rentable Area" made two points: (i) the "deemed" area corresponded to the agreed rented area mentioned earlier in the recital; and (ii) neither area included the open-air space.

[166] Other provisions in the Boreal Sublease support the interpretation that the premises sublet by Torstar to Boreal only consisted of the 46,707 square feet of "usable area" and did not include the open-air warehouse space.

[167] Art. 3 of the Boreal Sublease is headed "As-is" and states:

> The Subtenant acknowledges and agrees that it has inspected the Sublet Premises and accepts the Sublet Premises as of the commencement of the Fixturing Period in their "as is" condition with all furniture removed and in a clean "broom swept" condition…

[168] Article 6(ix) contains a covenant by Boreal "to use the Sublet Premises only for educational purposes and/ or the purposes of general office use as the case may be...".

[169] Both arts. 3 and 6(ix) make sense if what Boreal was subleasing was the "usable area" office space outlined on Schedule A; neither makes any sense if applied to the third-floor open-air warehouse space.

[170] Further, Torstar bases its argument in part on the fact that there is no access from the third-floor office space to the third-floor open-air warehouse space. That being the case, then upon executing the Boreal Sublease Torstar was in immediate

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breach of the covenants it gave in art. 8 that it warranted and represented that to the best of its knowledge and belief "the Building provides for barrier free access to the third floor in compliance wit[h] all applicable laws and codes" and that the "Subtenant's staff and personnel shall have 24-hour per day, 7 days per week, 52 weeks per year access to the Sublet Premises". Those covenants make perfect sense if what Boreal was subleasing was the usable office portion of the third floor; they make no sense if they are intended to include the inaccessible open-air warehouse space.

[171] The Landlord's Consent to Sublease further supports the motion judge's finding that the Sublet Premises did not include the open-air warehouse space. The Consent to Sublease was signed by 142 Ontario, Boreal, and Torstar.

[172] The Consent to Sublease does not use the phrase "the entire 3rd floor". Instead, Recital D to the Consent to Sublease states:

> The Tenant [i.e. Torstar] has applied to the Landlord for its consent to a sublease of a portion of the Premises (the "Subleased Premises"), as shown hatched on the floor plan attached hereto as Schedule "A", located on the third (3rd) floor of the Building, to College Boreal (the "Subtenant") … in accordance with the terms of a sublease agreement dated the 1st day of July, 2011 (the "Sublease") between the Tenant and the Subtenant. [Emphasis added.]

[173] The hatched portion of the floor plan tracks the area outlined in red on Schedule A to the Boreal Sublease, namely the "usable area" and does not include the open-air warehouse area.

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[174] Article 15 of the Consent to Sublease contains an agreement between Torstar and Boreal that divides the Sublet Premises into two areas: an area Boreal intends to use as “administrative office space” (shown outlined in red on the Schedule A1 layout plan) and an area Boreal intends to use as “classrooms and laboratories” (shown outlined in green on Schedule A1). Article 10 contained the Landlord’s consent to Boreal using the Subleased Premises as “an educational facility and administrative/general offices incidental thereto”. These provisions do not contemplate the warehouse space forming part of the Sublet Premises.

[175] Article 3 of the Consent to Sublease provided that if a defined “Termination Event” occurred, Boreal had the right to notify the Landlord that it wished “to enter into a direct lease for the whole of the Subleased Premises (the ‘Demised Premises’) with the Landlord.” The form of direct lease was attached as Schedule C to the Consent to Sublease. It defined the Demised Premises in art. 1.4 as “[t]he space outlined in red on Schedule “B” of this Lease, designated as Suite 300, located on the third (3rd) floor of the Building and having a deemed Rentable Area of 46,707 square feet”, the same area as the “Deemed Rentable Area” in the Boreal Sublease. The leased area identified on Schedule B to the form of direct lease tracked the area outlined in red on Schedule A to the Boreal Sublease: namely, the “usable area”, which excluded the open-air warehouse space.

[176] When the provisions of the Boreal Sublease and Consent to Sublease are considered as a whole, they disclose that the motion judge did not make a palpable

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and overriding error in finding that Torstar did not sublease the entire third-floor area to Boreal: at para. 19. On the contrary, that finding by the motion judge was correct; she made no reversible error.

[177] Torstar describes the parties' agreement on the Deemed Rentable Area in the Boreal Sublease as a "technicality" that should not play a role in the application of art. 8.1 to the calculation of "profit" from the Boreal Sublease. With respect, on the face of the Boreal Sublease that is not a tenable description of the defined term. The definition of "Deemed Rentable Area" clearly reflected a key agreement reached by the parties to the Boreal Sublease, as Boreal paid Torstar rent calculated using the Deemed Rentable Area. Torstar's submission that the Deemed Rentable Area is a mere "technicality" that the court should ignore in its interpretative exercise amounts to an effort to adjust the terms of the Boreal Sublease, an adjustment expressly prohibited by the terms of Recital C. Accordingly, the motion judge did not commit any error in using the Deemed Rentable Area for purposes of comparing the rent received by Torstar from Boreal for that space with the rent it paid Pinnacle for that same amount of space.

[178] In its factum, Torstar argues that, when the Lease and Sublease are read as a whole, "Torstar and Boreal rented the space on the same physical basis" and "[w]hat is clear from the diagrams in the Lease and Sublease is that Boreal was subletting the third floor on the exact same basis as Torstar was renting it (as both Diagrams show the third-floor Open Air Space as inaccessible)." With respect, that

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completely misreads the Lease and Boreal Sublease. Torstar's argument: ignores art. 1.4 of the Lease (reproduced above at para. 25) that describes the "Rentable Area" for the third floor as 65,534 sq. ft., consisting of both plant and tower space, which was a significantly larger area than that subleased to Boreal; ignores Schedule A of the Boreal Sublease; ignores Schedule A to the Consent to Sublease; and ignores Schedule B to the form of direct lease attached to the Consent to Sublease. Torstar paid Pinnacle rent using the rentable area of 65,534 sq. ft.; it charged Boreal sub-rent on 46,707 sq. ft. Torstar was not subletting the third floor on the same physical basis as it was renting it from Pinnacle.

[179] Quite apart from the language of the Boreal Sublease, the argument Torstar advances makes no commercial sense. My colleagues contend, at para. 67 of their reasons, that it made no commercial sense for Torstar to sublet only the usable third-floor office space. But, with respect, they fail to flip the question around and examine the issue from the perspective of the other party to the Sublease – namely, Boreal.

[180] Why would Boreal agree to sublease the entire third floor including the open-air warehouse space when the crux of Torstar's complaint in this proceeding is that such space was not usable and, therefore, Torstar should not bear the cost of it? Even if Torstar provided the open-air space rent-free, why would Boreal risk exposure to any liability for space that it could not use? Of course, it makes no sense that Boreal would agree to such an arrangement. The Boreal Sublease and

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Consent to Sublease state that Boreal intended to use the subleased premises as an educational facility and associated administrative offices. Why would Boreal sublease warehouse space that, as a result of Torstar's changing use of the warehouse over the years, had been rendered unusable for most potential subtenants, especially those like Boreal looking for usable office space? The more sensible interpretation of the Boreal Sublease, and the one adopted by the motion judge, is that Boreal agreed to sublease the entirety of the usable third-floor office space, which amounted to 46,707 sq. ft., or what the recital defined as the "Deemed Rentable Area". That is certainly what the floor plans appended to the Boreal Sublease and Consent to Sublease show.

[181] Before leaving this issue, I wish to address two arguments Torstar advanced in passing during oral argument.

[182] First, Torstar suggested that its continued payment of rent for the open-air portion of the third floor was the product of a condition imposed by 142 Ontario in return for it consenting to the Boreal Lease. That suggestion finds no support in the evidence. The only evidence of an effort by Torstar to surrender any part of the third-floor space is that reflected in the terms of the 2019 Lease Amending Agreement.

[183] Second, Torstar advanced what I understood to be a kind of "implied surrender" argument, which runs as follows: although the Lease requires Torstar

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to pay rent for the open-air space at the third-floor level, it in fact does not use that space. Rather, Pinnacle has used it for various events towards the end of the original term of the Lease; such use by Pinnacle somehow resulted in Torstar's "implied surrender" and Pinnacle's acceptance of the "implied surrender" of the third-floor open-air space.

[184] However, the evidence does not support such an argument. The record discloses that: (i) during the time of Torstar's sublease of part of the third floor to Boreal, Torstar remained the tenant of the entire third floor under its Lease with Pinnacle; (ii) Torstar continued to pay Pinnacle rent on that entire area; and (iii) Torstar did not surrender or attempt to secure Pinnacle's consent to the surrender of the open-air portion of the third floor during the term of the Sublease to Boreal, although it did surrender other parts of the demised premises on other floors of the Building. Absent such a surrender, whether or not Pinnacle used the third-floor open-air space is not relevant to the application of art. 8.1 of the Lease, which requires focusing on the "part of the Premises" sublet by Torstar to Boreal.

[185] As well, this "implied surrender" argument is premised on Torstar's entitlement to use the open-air space during the term of the Boreal Sublease. But if, as Torstar submits (and my colleagues appear to accept), it had subleased all of the third floor to Boreal, then one would expect any evidence about complaints regarding the Landlord's interference with the use of subleased space to come from Boreal, not Torstar. The record contains no such evidence.

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G. The commercial absurdity argument

[186] Torstar submits that the motion judge's interpretation of the Profit Clause and Boreal Sublease recital would result in a commercial absurdity. There is a certain visceral power to Torstar's argument: given that as a practical matter the third-floor open-air warehouse space is unusable, then it is absurd, Torstar contends, that it should be left holding the bag for its cost. The answer to that submission, in my view, is a simple one: There is no absurdity in adopting an interpretation under which Torstar bears the cost of that space because that was the deal Torstar struck when it entered into the Lease, knowing full well that the third-floor open-air warehouse space might well become "orphan" space that, as a practical matter, Torstar could not sublet.

[187] No commercial absurdity results from the motion judge's interpretation when one recalls the circumstances that existed at the time Torstar and 142 Ontario entered into the restated Lease and the surrender rights set out in the Lease.

[188] The third-floor premises demised to Torstar on which its rent to the Landlord was calculated consisted of 65,534 square feet of both "plant" and "tower" space. The Lease permitted Torstar to sublet any or all of that third-floor space. However, the Lease only granted Torstar a right to surrender the tower space after 10 years. If Torstar wanted to surrender the warehouse portion of the third-floor space, it would require the landlord's consent. As well, once the Canada Post Sublease

expired, the first and second floor warehouse space it had rented had to be surrendered to the landlord.

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[189] When read together, these provisions of the Lease clearly indicated that once Canada Post ended its sublease, Torstar would be left with “orphaned” third-floor warehouse open-air space: Torstar had ceased any direct use of the space since it had removed its printing presses in 1992. The Lease permitted Torstar to sublet the third-floor open-air warehouse space. If it could not, Torstar did not enjoy a unilateral right to surrender the space. It would require the Landlord’s consent to surrender the space. There is no evidence in the record that Torstar ever sought such consent, either before it entered into the Boreal Sublease or prior to the expiry of the Boreal Sublease.

[190] Accordingly, an interpretation of the Lease that would result in Torstar holding the “cost bag” for unusable third-floor open-air warehouse space would not result in a commercial absurdity. The risk of such a possibility was clear on the face of the Lease that Torstar executed in August 2000. Put differently, it was a foreseeable commercial risk that Torstar accepted by entering into the Lease.

H. The “costs-incurred-in-connection-with” argument

[191] The Profit Clause contained in art. 8.1 of the Lease states:

> Any profit (net of all reasonable costs incurred by [Torstar] in connection therewith) earned by [Torstar] in assigning this Lease or subletting or licensing all or any part of the Premises (except pursuant to the existing

> licences, sub-leases or other rights granted to third parties as of the Term Commencement Date) shall be paid by [Torstar] to the Landlord as Additional Rent …

[192] Art. 8.1 required Torstar to pay Pinnacle as "Additional Rent" any "profit … earned by [Torstar] in … subletting … all or any part of the Premises", "net of all reasonable costs incurred by [Torstar] in connection therewith". The language makes clear that the costs deductible from any profit earned had to be "costs incurred … in connection" with the sublease.

[193] However, as the analysis in the preceding section of art. 1.4 of the Lease discloses, Torstar's obligation to pay rent on the entire third-floor area, in both the tower and the podium/warehouse, originated with the Lease. The Profit Clause used the rent Torstar paid to Pinnacle pursuant to the Lease for space it subleased to a third party for the purpose of determining whether Torstar earned a "profit" on the subleased space. That subleased space was integral to the "apples-to-apples" rent comparison required by art. 8.1. However, Torstar's payment of rent to Pinnacle on the third-floor open-air space that was not subleased to Boreal could only be offset against rent it received under the Boreal Sublease if it was a cost "incurred … in connection" with the 2011 Boreal Sublease. But it was not. Instead, it was an obligation, or cost, in connection with non-subleased space that flowed from, or was incurred in connection with, the Lease with Pinnacle.

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I. Summary of analysis

[194] For these reasons, I see no basis for appellate interference with the motion judge's conclusions that: (i) in calculating the art. 8.1 "profit" Torstar earned on its sublet of some third-floor space to Boreal, Torstar could only take into account the rent it paid to Pinnacle for the "part of the Premises" it actually sublet to Boreal; and (ii) Torstar's continued payment of rent to Pinnacle for the open-air part of the third floor not subleased to Boreal did not constitute a "reasonable cost … in connection" with the Boreal Sublease for purposes of the art. 8.1 "profit" calculation. Consequently, I am not persuaded by this ground of appeal advanced by Torstar.

III. SECOND ISSUE: TREATMENT OF THE FIVE-MONTH RENT-FREE PERIOD

[195] The Boreal Sublease contained two rent-free periods: art. 4 granted a rent-free period of three months from October to December 2011 to allow Boreal to install fixtures; and art. 6(ii) provided for an additional five-month rent-free period from the start of the term of the sublease in January 2012 through to May 2012.

[196] The motion judge held that the three-month fixturing rent-free period constituted a "reasonable cost" for purposes of the art. 8.1 calculation. However, when settling her judgment, the motion judge refused to treat the five-month rent-

free period in early 2012 as a “reasonable cost” on the basis that Torstar did not refer to those costs in their factum below.

[197] Torstar submits the motion judge erred in so doing.

[198] I disagree.

[199] The motion judge’s oral reasons on the attendance to settle the terms of the judgment clearly explain that she rejected Torstar’s attempt to argue entitlement to the inclusion of the five-month rent-free period on grounds of procedural fairness: it was a new argument not previously raised by Torstar and consideration of such a late argument would work an unfairness to Pinnacle. The motion judge stated:

> The objections [to the formal wording of the court order] are, number one. The inclusion of the cost of the five month rent free period at the beginning of the lease that Torstar argues was in evidence and never disputed between the parties. Pinnacle points out that these costs were not referred to in Torstar's argument at the hearing of this motion. I agree that this argument was not raised before the court at the hearing.
>
> Secondly, the pre-judgment interest rate, which Pinnacle seeks, is a compound interest rate at the rate under the lease. Although Pinnacle states that the calculation of these amounts were in the materials, which includes thousands of pages submitted by both parties, Torstar points out that there was no mention of this at the hearing of this motion. I agree.
>
> …
>
> Pinnacle relies on the position of Torstar, which was also relied on and made at the hearing, with respect to the

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> amount of deduction that should be included as reasonable expenses. These amounts were [$]878,992. This amount is referred to in the court's endorsement.
>
> …
>
> I find that it would be against our principles of fairness to allow Torstar, on the one hand now, to change the position that was argued at the hearing with respect to the amount of "reasonable expenses" that may be deducted from the profit calculation.
>
> And further that Pinnacle's, on the other hand, request for an award of compounded interest in accordance with its interpretation of the contract would, in my view, result in unfairness to the other party. Pinnacle did not get a chance to respond to the argument that Torstar now raises to settle the order. And Torstar did not get a chance to argue Pinnacle's submission that the interest rate should be compounded pursuant to its interpretation of the contract.
>
> Further, it is also against our basic principles of the finality of litigation for the parties to raise both of these issues at this motion to settle the order that were not, most importantly, argued or made at the hearing.
>
> For this reason, I disagree with the arguments of both parties with respect to the orders that they seek. In order to avoid any further confusion, disputes, and further court appearances between these parties with respect to the proceedings, the court orders as follows. And this, part[ies], is where I'm going to need your assistance because you have not given me the information that I require.[9]

[9] Transcript of the August 28, 2023 hearing, at pp. 1-4.

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[200] I see no error in principle in the motion judge's exercise of her discretion to refuse to entertain Torstar's substantive submission at the time of settling the order for fairness reasons. I do not accept this ground of appeal by Torstar.

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IV. THIRD ISSUE: WHICH LIMITATION STATUTE APPLIES?

A. The issue stated

[201] Article 8.1 of the Lease provided that "profit" earned by Torstar on a sublease was payable to the landlord "as Additional Rent". Before the motion judge, Torstar submitted that: (i) the limitations statute that applied to Pinnacle's claim was the *Limitations Act*; (ii) Pinnacle's claim was reasonably discoverable in 2012; and (iii) as a result, Pinnacle's claim was barred by the two-year limitation period in s. 4 of the *Limitations Act*. Pinnacle took the position that the six-year limitation period in s. 17(1) of the *RPLA* governed its claim, with the result that only the portions of its claim that arose more than six years before it commenced this action were statute-barred.

[202] Several of the material facts in the evidence relevant to the applicable limitation period were as follows:

(i) The term of the Boreal Sublease commenced on January 1, 2012;

(ii) The evidence disclosed that Torstar started to earn a "profit" on the net difference between the sub-rent it received from Boreal and the rent for the sublet space it paid to Pinnacle around October 2014 or December

2015, depending on what “reasonable costs” were netted out in the calculation;[10]

(iii) Pinnacle demanded payment of the “profit” from Torstar by letter dated April 22, 2019; and

(iv) Pinnacle commenced its action to recover the “profit” by statement of claim issued June 1, 2020.

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[203] The motion judge did not deal with the limitation period issue in her initial reasons released in August 2022. Instead, she released an “Amended Amended Endorsement” about six months later that dealt with the limitation issue. In her very brief endorsement, she wrote:

> [5] The payments to Pinnacle by Torstar are rent and net profits earned from a sublease are payable as “Additional Rent.” I agree that the *RPLA* applies and that Pinnacle’s claims are subject to a six year limitation.
>
> [6] The breach of the Office Lease required Torstar to have earned a profit from the Subleases which it did not pay to Pinnacle. Costs incurred with respect to the Subleases would have to be deducted from the monthly rent received pursuant to the Subleases.
>
> [7] I agree and find that the earliest date at which Torstar could have realized a profit from the Boreal

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[10] Respondent’s Compendium, Tab 9, pdf pp. 38-41. In his first affidavit filed in response to Torstar’s summary judgment motion, Mr. Montone, Pinnacle’s affiant, attached two tables that set out Pinnacle’s calculations of the net profit earned by Torstar under art. 8.1 of the Lease. One table used “reasonable costs” incurred by Torstar of $579,016.00. That would result in Torstar first generating a positive “net profit” in October 2014. The other table used higher “reasonable costs” of $878,992.00, which would result in the first positive “net profit” occurring in December 2015.

> Sublease is in October of 2014. The earliest date that the limitation period could expire is in the month of October 2020. This Action was commenced on June 1, 2020, within the six-year limitation period.

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[204] Torstar submits the motion judge erred in applying the six-year limitation period found in s. 17(1) of the *RPLA* as the remittance of "profit" required under art. 8.1 of the Lease did not constitute "rent" within the meaning of that act. In its factum, Torstar explained its argument in the following way:

> 93. …[T]his case does not involve a claim for "rent" within the meaning of s. 17 of the *RPLA* because the obligation to remit profit from a sublease is not "compensation for the use of land or premises", nor is it "concerned with the direct operation and maintenance of the leased premises". Rather, the failure to remit "profit" from subletting is an alleged breach of (sic) Pinnacle seeks damages for this breach. These damages are not directly tied to the use of the land or concerned with the direct operation and maintenance of the premises.
>
> 94. Pinnacle is seeking contractual damages in excess of "land use" compensation.

[205] On its part, Pinnacle contends the motion judge did not err in applying the *RPLA* to its claim. It submits that the profits earned under art. 8.1 of the Lease "are directly derived from the rent paid on real estate to Torstar by College Boreal. Essentially, Torstar agreed to pay any rent received by it in excess of the rent it was paying to Pinnacle."

B. Analysis

Whether the "additional rent" payable under the Profit Clause is "rent" for purposes of the *RPLA*

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[206] I accept Pinnacle's submission that the motion judge did not err in concluding that the *RPLA* applied to Pinnacle's action claim for "profit" under art. 8.1 of the Lease. In my view, the substantive nature of Pinnacle's action is one for the recovery of "arrears of rent" within the meaning of *RPLA* s. 17(1).

[207] Section 17(1) of the *RPLA* provides, in part, that: "No arrears of rent … or any damages in respect of such arrears of rent or interest, shall be recovered by any … action but within six years next after the same respectively has become due".

[208] What constitutes "rent" for purposes of s. 17(1) of the *RPLA*? The statute does not provide an exhaustive definition. *RPLA* s. 1 states that "'rent' includes all annuities and periodical sums of money charged upon or payable out of land" (emphasis added). But, as Mew J. explained in *Pickering Square Inc. v. Trillium College Inc.*, 2014 ONSC 2629, 44 R.P.R. (5th) 251,[11] at para. 30, the inclusionary language of s. 1 simply means that "rent" can refer to either of two concepts of rent under English law: (i) "rent charge" – a landowner's obligation to pay a periodic

---

[11] Affirmed 2016 ONCA 179, 395 D.L.R. (4th) 679. However, the issue on appeal focused on when certain claims arose, not on the meaning of "rent" under the *RPLA*.

sum to another, secured by a charge on the land; as well as (ii) “rent service” or “rent reserved” – the amount payable under a lease between a landlord and a tenant for the exclusive possession of land or other property capable of being held in possession.

[209] After reviewing the history, context, and legislative scheme for the law of limitations in Ontario, Mew J. concluded, at para. 36, that “‘rent’ in s. 17 of the *RPLA*, as it applies to rent service or rent reserved, means the payment due under a lease between a tenant and landlord as compensation for the use of land or premises.”

[210] I accept that definition.

[211] To determine whether the debt created by a tenant’s failure to make a payment stipulated in a lease constitutes “arrears of rent” for purposes of *RPLA* s. 17(1), it is necessary to assess the nature of the obligation to pay created by the lease.

[212] The language used by the parties in the lease to characterize the payment must be considered, but it is not determinative: *Pickering Square*, at paras. 37-40. As a result, the description of a payment as “rent”, “additional rent”, or something else – such as the word “profit” in art. 8.1 of the Lease – is not determinative; a court must examine the nature of the payment obligation to ascertain whether it constitutes a payment due under a lease as compensation for the use of land or

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premises: what Mew J. described as the "objective meaning" of "rent" in *RPLA* s. 17(1).

[213] The starting point of the characterization exercise is the lease between the parties. The Profit Clause is found in art. 8 of the Lease, which deals with "Assignment and Subletting". The location of the Profit Clause in the lease document is an initial indication that the payment obligation created by art. 8.1's Profit Clause likely concerns the financial consequences of the tenant, Torstar, subletting some or all of the premises it was leasing from the landlord.

[214] The language of the Profit Clause confirms this initial indication. It creates an obligation on Torstar, as tenant, to pay the landlord "[a]ny profit … earned by [Torstar] in … subletting … all or any part of the Premises (except pursuant to the existing … sub-leases … as of the Term Commencement Date". There is no dispute between the parties that the Profit Clause calculates the tenant's payment obligation by comparing the rent Torstar receives from a subtenant to the rent Torstar pays Pinnacle for the sub-leased space. As Torstar acknowledged in its factum at para. 52:

> Torstar does not dispute that the purpose of the provision is aimed at ensuring that a tenant does not profit from a sublease. This makes sense: the provision ensures that only the landlord can profit from its ownership of land and engage in the business of leasing its land for profit.

[215] The main financial effect of the Profit Clause is that the economic cost to the tenant, Torstar, of the space it leased from Pinnacle would be the rent it was

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required to pay under the terms of the Lease. If Torstar subleased any of that space, any excess of the sublease rent over the Lease rent was for the benefit of the owner of the land, not Torstar as tenant.

[216] Looked at in a slightly different fashion, the Profit Clause in art. 8.1 of the Lease reflected the bargain between the Building's landlord and its tenant, Torstar, that any compensation over the basic rent stipulated in the Lease that Torstar could secure from a third party for the use of subleased premises was to be paid to the landlord; Torstar as tenant could not retain that additional compensation for the use of the sublet part of the premises.

[217] At its heart, the Profit Clause was all about allocating the benefit of the rent received for the use of the premises during the term of the Lease.

[218] That the Profit Clause permitted Torstar, as tenant, to deduct its reasonable costs before remitting any excess of the sublease rent over the Lease rent does not change the nature of the payment obligation as one of "rent". The only "reasonable costs" that art. 8.1 permitted Torstar to deduct were "reasonable costs incurred by [Torstar] in connection therewith", that is in connection with subletting part of the Building. In other words, Torstar could deduct reasonable costs that it incurred to obtain, through a sublease, "compensation for the use of land or premises", specifically the sublet premises.

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[219] Torstar argued that the rent it paid to Pinnacle for open-air third-floor space should be treated as a reasonable cost deductible when performing the Profit Clause calculation. The motion judge rejected that submission. I have found no error in her conclusion.

[220] For these reasons, I see no error in the motion judge's conclusion that the *RPLA* applied to Pinnacle's action to recover the "arrears of rent" that arose under the Profit Clause in art. 8.1 of the Lease. Accordingly, I disagree with my colleagues' conclusion to the contrary.

When did time start to run under *RPLA* s. 17?

[221] Torstar advanced an alternative argument that, should the *RPLA* apply, time under the *RPLA* would have started to run in 2012, with the result that Pinnacle's entire claim was statute-barred since it started this action in 2020.

[222] I see no merit in that argument for two reasons. First, Torstar's obligation to pay Pinnacle any amount under the Profit Clause only arose when Torstar earned a "profit". The evidence clearly supported the motion judge's finding that "the earliest date at which Torstar could have realized a profit from the Boreal Sublease is in October of 2014."

[223] Second, Torstar's argument mischaracterizes the nature of its payment obligation under art. 8.1. By the terms of the Lease, if Torstar earned "profit" under art. 8.1., its obligation to pay such profit arose monthly during the term of the Lease.

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The Lease defined "Rent" to include "Additional Rents", which included the payment of any "profit" under s. 8.1.[12] The Lease required Torstar to pay the landlord "all Rent … in advance on the first day of each month without deduction".[13] Any failure by Torstar to pay, when due, any rent, including additional rent, "whether lawfully demanded or not", which continued for a period of 10 days after notice from the landlord, triggered several rights of the landlord, including payment of accelerated rent, re-entry of the premises, and forfeiture of the term of the Lease.

[224] The Lease created a periodic obligation to pay "profit". As this court noted in *Pickering Square Inc. v. Trillium College Inc.*, 2016 ONCA 179, 395 D.L.R. (4th) 679, at para. 24, the failure to perform a periodic obligation ordinarily gives rise to a breach and a claim as from the date of each individual breach. It was open to Pinnacle to sue on each breach until the end of the Boreal Sublease, which was August 2020.

[225] For these reasons, I am not persuaded that the motion judge erred in concluding that the six-year limitation period in *RPLA* s. 17(1) applied to Pinnacle's action.

[12] Lease, s. 15.1(gg).
[13] Lease, s. 4.7(g).

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V. FOURTH ISSUE: TORSTAR'S NEW ISSUE INVOLVING THE APPLICATION OF SECTION 2 OF THE *RPLA*

A. The issue stated

[226] Section 2 of the *RPLA* provides that nothing in that act "interferes with any rule of equity in refusing relief on the ground of acquiescence, or otherwise, to any person whose right to bring an action is not barred by virtue of this Act." On this appeal, Torstar submits, by way of an alternative argument, that should the *RPLA* apply to Pinnacle's claim, *RPLA* s. 2 should estop Pinnacle "from proceeding with a retroactive claim for arrears of damages in circumstances where it acquiesced to the alleged breach for years, including during lease extension negotiations."

[227] Pinnacle submits Torstar's argument amounts to a new issue on appeal that this court should not entertain. As well, Pinnacle contends that "Torstar has not demonstrated all facts necessary to address this point are before the court as fully as if the issue had been raised at the motion."

B. Analysis

[228] I accept that Torstar's *RPLA* s. 2 defence is a new argument raised for the first time on appeal. In para. 22 of its statement of defence, Torstar did plead and rely upon the equitable doctrine of estoppel by convention. However, while Torstar mentioned the *RPLA* in both its statement of defence and notice of motion for summary judgment, it did not particularize a reliance on *RPLA* s. 2 as a basis for

defences to Pinnacle's claim. While the parties filed short extracts from the factums they used before the motion judge, there is nothing in the record before us that discloses Torstar advanced a *RPLA* s. 2 defence on its motion below. Finally, the motion judge made no reference in her various endorsements to an *RPLA* s. 2 defence. Taken together, the record supports Pinnacle's argument that Torstar is now seeking to raise a new issue on this appeal.

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[229] In *Svia Homes Limited v. Northbridge General Insurance Corporation*, 2020 ONCA 684, 7 C.C.L.I. (6th) 1, this court summarized, at para. 25, the principles that guide consideration of whether an entirely new argument should be entertained for the first time on appeal:

> The rationale for the general rule that appellate courts will not entertain an entirely new issue on appeal is that "it is unfair to spring a new argument upon a party at the hearing of an appeal in circumstances in which evidence might have been led at trial if it had been known that the matter would be an issue on appeal". The party seeking to raise the new argument must persuade the appellate court that the facts necessary to address the point are before the court "as fully as if the issue had been raised at trial", a burden more easily met if the issue is one of law. The decision whether to grant leave to allow a new argument is discretionary, "guided by the balancing of the interests of justice as they affect all parties": *Kaiman v. Graham*, 2009 ONCA 77, 245 O.A.C. 130 (Ont. C.A.), at para 18.

[230] I am not persuaded that Torstar has demonstrated that it has met the conditions required to raise an entirely new argument on appeal.

[231] First, the evidentiary record obviously was created to deal with the two main issues put in dispute by the parties: (i) whether Torstar had breached the Profit Clause in art. 8.1 of the Lease; and (ii) whether prescription periods contained in the *Limitations Act* or *RPLA* applied. The issues framed by the pleadings and notices of motion did not advert to a *RPLA* s. 2 defence by Torstar. Although Torstar's affiant did depose that Pinnacle did not raise the possibility of an arrears of rent claim during the parties' 2018-2019 Lease extension negotiations, I am not satisfied that the facts necessary to address Torstar's *RPLA* s. 2 defence are before this court as fully as if the issue had been raised on the summary judgment motions.

[232] Second, Torstar's new issue on appeal raises a significant legal question: specifically, are the equitable defences preserved by *RPLA* s. 2 available to assert against a legal claim, such as a claim for arrears of rent? The parties did not brief that issue in their factums. Yet, a cursory review of the jurisprudence and commentaries reveals that this issue requires more detailed legal submissions. On the one hand, the authors of *The Law of Limitations,* 4th ed.,[14] suggest, at p. 66, that equitable defences, such as laches or acquiescence, are not applicable to claims which are not founded in equity. On the other hand, there are hints in this

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[14] Graeme Mew, Debra Rolph & Daniel Zacks, *The Law of Limitations*, 4th ed. (Toronto, LexisNexis Canada, 2023).

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court's decision in *Intact Insurance Company of Canada v. Lombard General Insurance Company of Canada*, 2015 ONCA 764, 128 O.R. (3d) 658, that the earlier decision of the Supreme Court of Canada in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, could be read as extending the application of s. 2 of the old *Limitations Act*, R.S.O. 1990, c. L.15, (now *RPLA* s. 2) to non-equitable claims: see, for example, *Intact*, at paras. 36-40. The factums of the parties filed before us simply do not assist this court in understanding and resolving this legal issue.

[233] For these reasons, I am not satisfied that the record on appeal provides an adequate basis upon which this court could determine Torstar's new argument that *RPLA* s. 2 provides it with a defence to Pinnacle's claim. Consequently, I would not entertain this new argument.

VI. DISPOSITION

[234] For the reasons set out above, I respectfully dissent. I would dismiss Torstar's appeal.

Released: October 15, 2024 "E.E.G."

"David Brown J.A."

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Schedule A

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SCHEDULE "B-1"
FLOOR PLANS OF THE PREMISES

FREELAND STREET

NORTH PARKING LOT

QUEENS QUAY

YONGE STREET

CLASSIFIED ADVERTISING

DISPLAY ADVERTISING

ADVERTISING 5182 SQ FT

MARKETING RESEARCH 1777 SQ FT

AREA SUMMARY CHART:	SQ FT
STORAGE AREAS	[illegible]
CLASSIFIED ADVERTISING	[illegible]
ADVERTISING	[illegible]
MARKETING	[illegible]
MARKETING RESEARCH	1777
VISITOR LOUNGE	[illegible]
AUDIT	[illegible]
DISPLAY ADVERTISING	[illegible]
SUB-TOTAL	[illegible] SQ FT
REMAINING AREAS	[illegible]
TOTAL [illegible] FLOOR AREA	[illegible] SQ FT

THE TORONTO STAR

ONE YONGE STREET, TORONTO, ONTARIO

THIRD FLOOR PLAN

Sweeney Dale

Schedule B

SCHEDULE A

FLOOR PLAN

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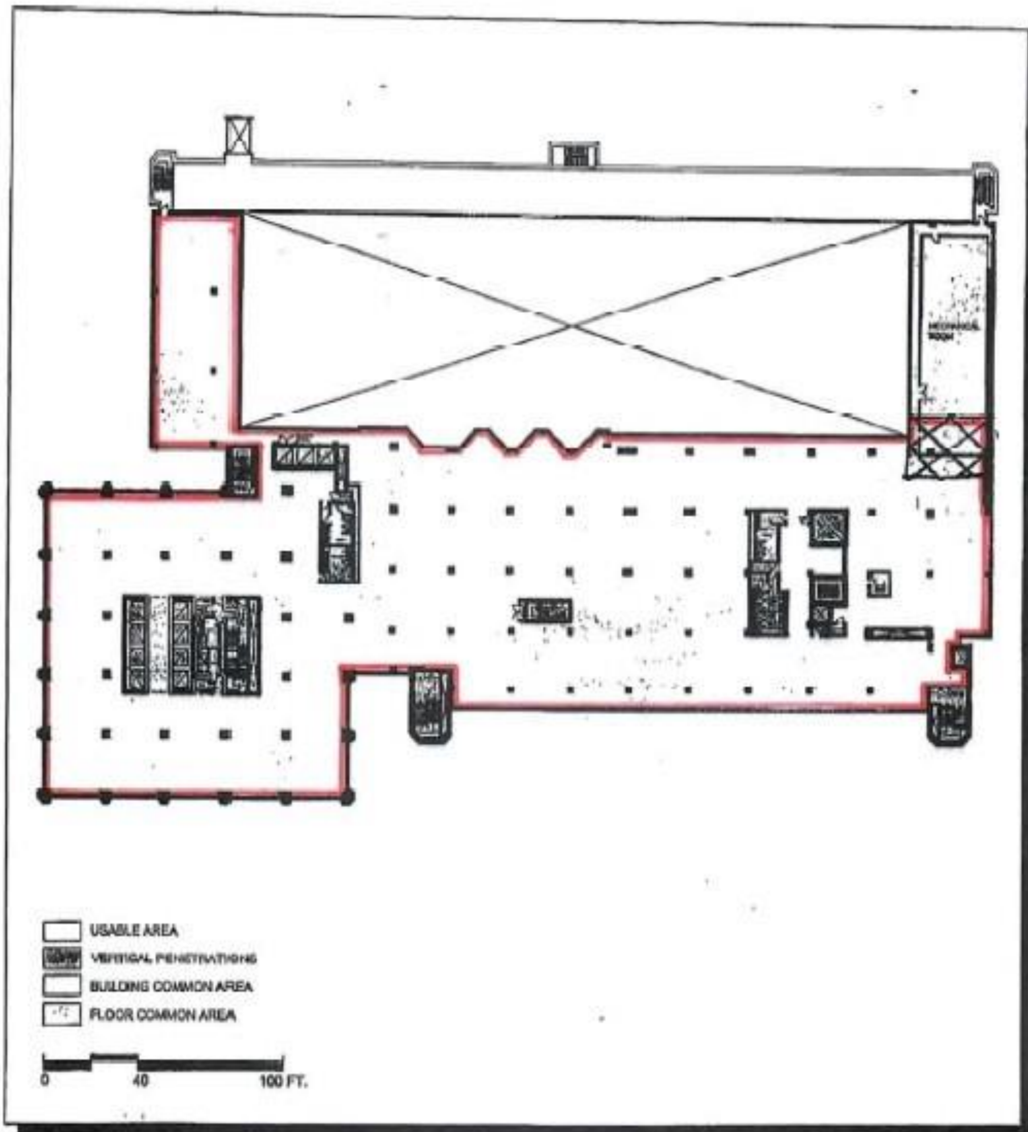

REDCLIFF

REALTY MANAGEMENT INC.

1 Yonge Street

Toronto, Ontario

Third Floor - Area Summary

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