

SUPREME COURT OF YUKON

Citation: Grove v Arctic Colour Tours Inc,
2024 YKSC 55

Date: 20241011
S.C. No.24-A0038
Registry: Whitehorse

BETWEEN:

WAYNE GROVE

PETITIONER

AND

ARCTIC COLOUR TOURS INC.

RESPONDENT

Before Justice E.M. Campbell

Counsel for the Petitioner

Meagan Lang

Counsel for the Respondent

Morgan Burris

REASONS FOR DECISION

OVERVIEW

[1] The petitioner, Wayne Grove, leased a parcel of land he owns in the Yukon to the respondent, Arctic Colour Tours Inc. (“Arctic Colour”), a tourism operator and developer. In 2016, the parties entered into the first of several commercial leases with respect to that land. As contemplated in the leases, Arctic Colour invested in the construction of a main building and four duplexes on that land. Arctic Colour uses the land and the buildings as a base for its tourism operations, which provide overnight accommodations and food to clients during northern lights tours.

[2] The lease agreement at issue in this proceeding commenced in 2022. It has a short initial term with an option to renew for up to five additional one-year terms, with a

potential end date of April 30, 2028 (the “2022 Lease”). As per the terms of the lease, the first term ended on April 30, 2023. The first one-year renewal was automatic. It ended on April 30, 2024.

[3] It is not disputed that, throughout 2023 and into 2024, despite ongoing requests from Mr. Grove, Arctic Colour failed to maintain and repair the main building and duplexes resulting in the Yukon Fire Marshal issuing a notice of closure for the buildings on March 14, 2024. The next day, Mr. Grove terminated the 2022 Lease. However, Arctic Colour has remained in possession of the premises.

[4] Mr. Grove filed a petition seeking a writ of possession to enforce a vacancy, a declaration that Arctic Colour is overholding the premises and that he is entitled to compensation, and an order for summary accounting to determine the specific amount of compensation he is entitled to under the lease.

[5] Arctic Colour concedes it breached the 2022 Lease. However, it seeks relief from forfeiture based on its considerable financial investment in the premises, the significant negative impact it states an order to vacate the property would have on its ability to continue its operations, and the fact it has now addressed the deficiencies noted by government authorities and most of the repairs and maintenance required by Mr. Grove. In addition, Arctic Colour does not dispute that, without a valid renewal, the 2022 Lease ended on April 30, 2024. Arctic Colour concedes it did not meet the conditions precedent to a renewal set out in the 2022 Lease. However, it seeks relief from its failure to meet the conditions precedent to renew the lease.

[6] For the following reasons, Arctic Colour’s request for relief is dismissed. Mr. Grove’s petition is granted with costs.

ISSUES

- [7] The parties agree that the issues raised in this case present as follows:
- a. Is relief from failure to renew the lease available at law?
 - b. If so, should Arctic Colour be granted relief from its failure to renew?
 - c. If so, should Arctic Colour be granted relief from forfeiture?

FACTS

[8] The evidence on this petition consisted of four affidavits with appended documents: three affidavits of Mr. Grove and one affidavit of Lin Yang, a director of Arctic Colour and general manager of Arctic Colour's parent company, 318 Arctic Colour Tour Developing Ltd. Most of the relevant facts are uncontested.

History of the landlord-tenant relationship

i. The 2016 Lease

[9] Wayne Grove is the legal owner of a parcel of land legally described as Lot 1592, Quad 105 D/14. Plan 2018-0082, previously known as Lot 1444-2, Quad 105 D/14, Yukon Territory, Plan 2016-0053 (the "Property").

[10] On August 11, 2016, Mr. Grove and Arctic Colour entered into their first lease agreement regarding the Property (the "2016 Lease"). The 2016 Lease had a five-year initial term with an option to renew for five years.

[11] At the time, both parties understood that Arctic Colour intended to construct buildings on the Property to operate northern lights tours including overnight accommodations and meals for its clients. Under the 2016 Lease, Arctic Colour had the obligation to build a number of structures, at its own costs, within 12 months of the commencement of the lease.

[12] On May 11, 2017, Mr. Grove terminated the 2016 Lease because of Arctic Colour's breaches. Those breaches were brought to Arctic Colour's attention in March 2017 but were not remedied. The breaches included: failing to pay contractors and using the main building to host clients before it was completed and without an occupancy permit delivered by the statutory authorities.

[13] Despite the termination of the lease, Arctic Colour remained in possession of the Property .

ii. The 2017 Lease

[14] Mr. Grove entered into a second lease with Arctic Colour (this time through its parent company: 318 Arctic Colour Tourism Development Ltd.) upon Arctic Colour's assurances that it would fulfil its obligations going forward if given another opportunity. This second lease commenced on August 31, 2017 (the "2017 Lease"). It had an initial term of five years with an option to renew for five years.

[15] Arctic Colour completed the construction of the main building in 2017. The duplexes were completed in 2018. Between 2016 and 2018, Arctic Colour invested more than \$1.26 million in the construction of the main building and four residential duplexes.

[16] Throughout 2018 and 2019, Mr. Grove notified Arctic Colour of several breaches to the 2017 Lease, including a failure to repair and maintain the Property (including the main building and the duplexes). It is not disputed that, in 2018, a conflict arose between Arctic Colour's directors regarding the company's ownership, which may have impacted its operations at the time.

[17] Arctic Colour used the Property on a reduced basis during the 2020/2021 winter season due to the Covid-19 Pandemic. As travel restrictions lifted, Arctic Colour returned to full operations during the 2021/2022 winter season.

[18] In 2021, despite Mr. Grove's numerous requests, Arctic Colour did not perform the work required to address issues regarding the main building's foundation and failed to reimburse Mr. Grove for the work he had done to prevent the foundation from sinking.

[19] By the spring of 2022, Arctic Colour had yet to give Mr. Grove notice of its intention to renew the 2017 Lease, a condition precedent to a renewal.

[20] On April 25, 2022, Mr. Grove formally advised Arctic Colour by letter that payment for the repairs he had completed was due, and that Arctic Colour was responsible for completing the repairs necessary to address the remaining issues with the foundation of the main building before the end of the term of the lease on October 31, 2022.

[21] Arctic Colour did not respond to the April 25, 2022 letter. It did not complete or address the foundation repairs either. As a result, Mr. Grove commenced proceedings in the Supreme Court of Yukon. On October 20, 2022, Chief Justice Duncan ordered Arctic Colour to pay the amounts claimed by Mr. Grove. In addition, she issued a declaration that the 2017 Lease was set to expire, by its terms, on October 31, 2022 (*Grove v 318 Arctic Color Tourism Development Ltd.*, 2022 YKSC 73).

[22] Following the termination of the 2017 Lease, Mr. Grove agreed to enter into a new lease with Arctic Colour. At the time, Arctic Colour's representatives stated the corporation would fulfil its obligations as a tenant.

iii. The 2022 Lease

[23] On November 1, 2022, Mr. Grove and Arctic Colour entered into the lease at issue in this matter. The 2022 Lease had a short initial term with an option to renew for five additional one-year terms. The 2022 Lease had a possible end date of April 30, 2028, if all the renewal terms were exercised.

[24] In January 2023, the Yukon Chief Electrical Inspector inspected the main building and duplexes and found several deficiencies. He found the buildings had unsafe wiring that had been installed without a permit and in a manner that may be placing the occupants at risk of shock or fire. In a letter dated January 10, 2023, addressed to Mr. Grove, the Chief Electrical Inspector advised they had until May 31, 2023, to have a Yukon electrical contractor with a valid permit remedy the situation and to have the premises inspected and approved by the government. In addition, the Chief Electrical Inspector warned that failure to remedy the issues as required could result in the pursuit of actions under the *Electrical Protection Act*, RSY 2002, c 65.

[25] Later in January 2023, the Deputy Fire Marshal issued two reports in which he stated that the main building and the duplexes failed many electrical, fire, and safety requirements. The Deputy Fire Marshal required, among other things, that extension cords, power bars, and portable heaters installed in the crawl spaces under the duplexes be removed immediately.

[26] At the end of January 2023, the buildings failed an inspection by the Government of Yukon (Building Safety). The report, issued on January 30, 2023, found that the main building's "foundation ha[d] settled and cracked" and that the building was therefore unsafe to occupy until a "structural review was performed by [an] engineer" to determine

whether “the building structure [was] sound”. In addition, it was found that the kitchen was “not safe to produce food for public consumption” and that the storage room could not be used as a room where people could sleep.

[27] In the following months, Mr. Grove raised, on several occasions, with Arctic Colour the deficiencies identified by the statutory authorities and the necessity to address them through maintenance and repairs. He contacted contractors who could do the repairs and obtained quotes that he provided to Arctic Colour. However, Arctic Colour did not take steps to address the deficiencies.

[28] On May 17, 2023, Mr. Grove noticed a hole in the deck of the main building, which appeared to have been caused by a fire. Arctic Colour had placed a cooler over the burnt area in an attempt to hide it. When questioned about the fire, Arctic Colour's representatives indicated the fire had been caused by cigarettes placed in a plastic bucket on the deck.

[29] Mr. Grove proceeded to repair and level the main building's foundation and obtain the required approvals for the septic system. These repairs were completed by June/July 2023. Mr. Grove was partially compensated for this work through the \$20,000 security deposit that Arctic Colour had made under the terms of the lease. However, by the end of July 2023, the security deposit was depleted and \$1,159.97 was still owed to Mr. Grove.

[30] Mr. Grove also proceeded with the installation of a commercial kitchen to improve the main building, as contemplated by s. 6.2 of the 2022 Lease. Mr. Grove financed the renovations with the help of government funding.

[31] On June 29, 2023, Yukon Building Safety inspected the premises. The inspection confirmed that Mr. Grove's work had addressed the issue with the main building's foundation. However, the inspection noted that the plumbing system was non-compliant.

[32] On February 6, 2023, April 12, 2023, July 10, 2023, and October 4, 2023, counsel for Mr. Grove wrote to Arctic Colour's representatives and/or counsel for Arctic Colour:

- to outline the deficiencies found by the Deputy Fire Marshal as well as Building Safety, and to stress the need to perform the work necessary to address those deficiencies;
- to deplore the lack of cooperation of Arctic Colour's representatives in the Yukon;
- to confirm that Mr. Grove would use the \$20,000 safety deposit to address the main building's structural issues;
- to stress that Arctic Colour was responsible for and needed to address the electrical work and remedy the deficiencies identified by the Deputy Fire Marshal, otherwise the Fire Marshal would shut down the buildings;
- to formally notify Arctic Colour that Mr. Grove would not be amenable to renew the 2022 Lease if Arctic Colour failed to address the deficiencies in a timely manner (July and October 2023 letter); and
- to advise that Mr. Grove would terminate the 2022 Lease if the government authorities had to shut down the buildings due to unresolved deficiencies (July and October 2023 letter).

[33] By November 1, 2023, Arctic Colour had not notified Mr. Grove that it wanted to renew the 2022 Lease, as required. On November 24, 2023, counsel for Mr. Grove sent a letter to Arctic Colour, with a copy to its counsel, to notify Arctic Colour that if it did not provide notice to Mr. Grove of its intention to renew the 2022 Lease by December 31, 2023, Mr. Grove would assume that Arctic Colour did not wish to renew and he would take steps to lease the Property to someone else. Counsel also notified Arctic Colour that, in addition to providing notice, the tenant would have to bring the 2022 Lease into good standing, as provided by s. 2.2 of the 2022 Lease. Counsel added that, if Arctic Colour wanted to renew the lease, it had:

- (1) to effect the repairs and address all the deficiencies, the most pressing, including the electrical work, by December 31, 2023, and the others by May 1, 2024;
- (2) to replenish the \$20,000 safety deposit by December 31, 2023, as per para. 3.11 of the 2022 Lease; and
- (3) to pay the outstanding amount of \$1,159.97 owed to Mr. Grove for work he completed on behalf of the tenant by December 31, 2023.

[34] Counsel warned that if Arctic Colour ignored Mr. Grove's requests and failed to take steps to bring the 2022 Lease into good standing right away, it should not be surprised when Mr. Grove takes steps to end the 2022 Lease.

[35] On November 26, 2023, counsel for Arctic Colour emailed Mr. Grove's counsel to notify that Arctic Colour wanted to renew the 2022 Lease and to inform him that Arctic Colour would take steps to address the outstanding issues raised in the November 24th letter.

[36] During the week of February 12, 2024, Mr. Grove met with Lin Yang, who had travelled from China for that reason. During their meetings, Mr. Yang indicated that Arctic Colour wanted to enter into a long-term lease for the Property. Mr. Grove responded he was opened to a long-term lease but only if Arctic Colour could establish it could abide by the terms of the lease.

[37] At the end of February 2024, counsel for Arctic Colour requested that counsel for Mr. Grove provide bank account information to replenish the security deposit, which counsel for Mr. Grove provided on March 13, 2024. The \$20,000 security deposit was replenished the next day.

[38] On March 6, 2024, the Deputy Fire Marshal performed a follow-up inspection of the duplexes and the main building in the presence of an Arctic Colour representative to determine whether the deficiencies identified in January 2023 had been remedied as ordered.

[39] On March 7, 2024, the Fire Marshal's office emailed Mr. Grove and Arctic Colour, formally informing them that the Deputy Fire Marshal's inspection had revealed that, aside from the work Mr. Grove was doing in the kitchen, none of the deficiencies identified in January 2023 had been remedied or attempted to be remedied. The letter also indicated that, during his inspection, the Deputy Fire Marshal had to remove plugged in portable heaters from under the crawl spaces of the duplexes.

[40] Arctic Colour and Mr. Grove were advised that the Fire Marshal's office would conduct another inspection on March 14, 2024, and that the Fire Marshal may issue fines or order the closure of the buildings, if the deficiencies had not been corrected by then.

[41] On March 14, 2024, the Deputy Fire Marshal attended the premises and noted continued deficiencies. On the same date, a notice of closure was issued for the main building and the duplexes by order of the Fire Marshal until further notice for failure to remedy the deficiencies and the hazards they represented. The notice was posted on the main building and the duplexes.

[42] Other than the work Mr. Grove completed, Arctic Colour had not addressed any of the outstanding building deficiencies before the Fire Marshal shut down the premises on March 14, 2024.

[43] On March 15, 2024, counsel for Mr. Grove sent a letter by email to counsel for Arctic Colour and its representatives in the Yukon to provide formal notice of early termination of the 2022 Lease because Arctic Colour had “failed to conduct repairs and maintenance at the Property” as required by the lease. In that letter, counsel formally asked Arctic Colour to surrender the Property and its interest in good order in accordance with the 2022 Lease.

[44] Despite being informed of the termination, Arctic Grove has not vacated the Property.

[45] After March 15, 2024, Arctic Colour took steps to remedy most of the electrical deficiencies.

[46] However, on March 26, 2024, Mr. Grove saw that Arctic Colour had brought clients inside the main building even though the buildings were still closed, as per the Fire Marshal’s order. Arctic Colour explained it had decided to take a group of approximately 20 clients inside after some had complained they were cold during a Northern Lights tour. Counsel for Arctic Colour indicated in a letter to counsel for

Mr. Grove that, following this incident, Mr. Yang instructed Arctic Colour's representatives on the ground not to let anyone in the buildings while the Fire Marshal's order was in place.

[47] On March 27, 2024, the Deputy Fire Marshal inspected the Property and the buildings and removed the closure notices. The report from the Deputy Fire Marshal indicates that some deficiencies remained and had to be addressed within a specific timeline.

[48] On or about April 3, 2024, Mr. Yang, on behalf of Arctic Colour, made a written proposal to Mr. Grove to resolve their dispute and enter into a new lease agreement. In the proposal, Mr. Yang pointed out that all the deficiencies listed by the Fire Marshal had been resolved, and that Arctic Colour had remedied or was in the process of remedying the other deficiencies identified by Mr. Grove. Mr. Yang also provided an update on the progress made to address the deficiencies and repairs not yet completed. Mr. Yang invited Mr. Grove to add other issues to be addressed to the existing list if he wished. Mr. Yang added that a new manager had been appointed in the Yukon to address Mr. Grove's concerns. Mr. Yang proposed a better communication plan between the parties to ensure Mr. Grove's concerns are addressed. Finally, Mr. Yang proposed increasing the security deposit to \$30,000. Mr. Grove refused the offer.

[49] The term of the first renewal ended on April 30, 2024.

[50] At the time of the hearing, the following repairs remained outstanding:

- the electrical work required to provide heat to the crawl spaces of the duplexes had not been completed;
- the hole in the deck caused by fire had not been repaired; and

- broken doors and siding had not been repaired.

ANALYSIS

a. Is relief from failure to renew the lease available at law?

[51] The parties agree that the 2022 Lease terminated on April 30, 2024, because Arctic Tour did not meet all the conditions precedent to the renewal of the lease. However, Arctic Colour seeks relief from its failure to renew. Mr. Grove opposes Arctic Colour's request. Therefore, the first question to determine is whether equitable relief is available at law for a failure to renew a lease.

Positions of the Parties

[52] Mr. Grove relies on caselaw from the Court of Appeal for British Columbia to argue that equitable relief is not available at law in a case of failure to renew. Arctic Colour relies on caselaw from the Court of Appeal for Ontario to argue that equitable relief is available in limited circumstances.

Wayne Grove

[53] Mr. Grove submits that equitable relief is not available for a failure to renew because a failure to comply with a condition precedent to renew a lease is not a breach of an existing lease and cannot be cured through relief from forfeiture. Mr. Grove submits that the Court of Appeal for British Columbia reached this conclusion in *Clark Auto Body Ltd v Integra Custom Collision Ltd*, 2007 BCCA 24 ("*Clark Auto Body*"), and *Illingworth v Evergreen Medicinal Supply Inc*, 2019 BCCA 471 ("*Illingworth*"), after an extensive review of the caselaw on the issue. In addition, Mr. Grove submits that the British Columbia decisions should be followed because Yukon's legislation and caselaw are more in line with British Columbia than Ontario.

Arctic Colour

[54] Arctic Colour submits that the Court has the power to remedy its failure to renew the 2022 Lease and should exercise its discretion in Arctic Colour's favour.

[55] Arctic Colour relies on the decision of *Ross v T Eaton Co* (1992), 96 DLR (4th) 631 (CA) ("*Ross*"), from the Court of Appeal for Ontario to submit that courts have the power to remedy a failure to renew in limited circumstances.

[56] Arctic Colour submits that the wording of s. 57(2) of the *Commercial Landlord and Tenant Act*, RSY 2002, c 131 (the "*Act*"), which provides that a "judge may grant any relief", gives the Court broad discretion to grant any kind of relief in respect of a tenancy, including relief from failure to renew, when a landlord starts a court proceeding to enforce a right of re-entry or forfeiture.

[57] Arctic Colour submits that the decisions from British Columbia filed by Mr. Grove should not be followed because (i) the Court of Appeal for British Columbia took a technical approach and applied a strict interpretation of the relief available in concluding that a case of failure to meet a condition precedent to renew a lease is not a case of forfeiture, and that, consequently, no relief from forfeiture can be granted in cases of failure to renew; and (ii) Yukon legislation provides broad remedial powers to the Court to grant any relief it sees fit.

[58] Arctic Colour adds that precluding any kind of equitable relief in those circumstances would be overly and unnecessarily narrowing the Court's discretion given the broad wording of the legislation. Counsel submits that the decision of the Court of Appeal for Ontario in *Ross* is a good example of why that discretion should exist, and

that the *Act* provides the Court with sufficiently broad authority to exercise that discretion.

Analysis

The relevant statutory provisions

[59] Subsection 57(1) of the *Act* provides that a right of re-entry or forfeiture for a breach of any covenant or condition in a lease other than a provision regarding the payment of rent may be enforced by a landlord under certain conditions.

Subsection 57(2) of the *Act* provides that, in a proceeding commenced by a landlord to enforce a right of forfeiture, a tenant may apply to a judge for relief from forfeiture for a breach of any covenant where the breach is capable of remedy. The judge may, considering all the relevant circumstances, grant any relief that they see fit on any terms that the judge considers just. The relevant portions of s. 57 read as follows:

(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease other than a proviso in respect of the payment of rent, is not enforceable in any case in which the breach is capable of remedy or of being compensated by money payment, unless and until

(a) the landlord serves on the tenant a notice specifying the particular breach, and requiring the tenant to remedy or to make compensation in money for the breach; and

(b) the tenant fails, within a reasonable time after the service of the notice, to remedy the breach, or to make compensation in money to the satisfaction of the landlord for the breach.

(2) If a landlord is proceeding by action or otherwise to enforce any right of re-entry or forfeiture, whether for nonpayment of rent or for other cause, the tenant may in the landlord's action, if any, or if there is no such action pending, then in an action brought by the tenant, apply to a judge for relief, and the judge may grant any relief that, having regard

to the proceedings and conduct of the parties under the foregoing provisions of this section and to all the other circumstances the judge thinks fit, and on any terms as to payment of rent, costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, that the judge considers just.

(3) This section applies whether the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease or is implied therein.

...

(6) If relief is granted under this section the tenant shall hold and enjoy the demised premises according to the lease thereof made without any new lease.

[60] Section 47 of the *Act* provides that the *Judicature Act*, RSY 2002, c 128, applies to proceedings such as the one filed by Mr. Grove for a writ of possession under s. 45 of the *Act* alleging that Arctic Colour is overholding the premises.

[61] Section 13 of the *Judicature Act* grants the Supreme Court of Yukon the power to relieve a party against all penalties and forfeiture and to impose any terms as the Court sees fit.¹ The discretion of the Court under that provision is quite broad.

13 Subject to appeal as in other cases, the Court shall have power to relieve against all penalties and forfeitures and in granting that relief to impose any terms as to costs, expenses, damages, compensation, and all other matters as the Court sees fit.

The caselaw

[62] The Court of Appeal for British Columbia and the Court of Appeal for Ontario have reached different conclusions regarding the availability of equitable relief in cases where a tenant has failed to meet the conditions precedent to exercise their option to

¹ Section 47 of the *Act* recognizes that, except as otherwise varied by the *Act*, the provisions of the *Judicature Act* apply to applications made under this Part.

renew a lease. The Court of Appeal for British Columbia concluded that equity will not intervene in those cases, whereas the Court of Appeal for Ontario concluded that equitable relief is available but in very limited circumstances.

British Columbia caselaw

[63] In *Clark Auto Body*, the question was whether a tenant who was in breach of a covenant in a lease, the performance of which was part of the conditions precedent to the exercise of an option to renew the lease, was entitled to relief from forfeiture pursuant to s. 24 of the British Columbia *Law and Equity Act*, RSBC 1996, c. 253, which wording is quite similar to s. 13 of the *Judicature Act*.

[64] The Court of Appeal reviewed a number of Canadian and English decisions to conclude that equitable relief is not available in situations where the tenant has failed to comply with conditions precedent to the exercise of an option to renew a lease. In coming to this conclusion, the Court of Appeal drew a distinction between cases involving a breach of the contractual terms of an existing lease and cases involving a failure by the tenant to comply with a condition precedent to their right to exercise an option to renew the lease (i.e. to enter into a new contract (lease) with the landlord). The Court of Appeal stated that:

[30] ... it is essential to distinguish between the court's equitable jurisdiction to grant relief from forfeiture for the non-observance of covenants in an existing lease and from the failure to comply with conditions precedent to the exercise of an option to renew a lease. In the former, equity recognizes that a tenant may be permitted to cure its default and be relieved from forfeiture to allow it to retain the balance of the term of the lease. In the latter, there is no compulsion on the tenant to exercise the renewal option, but if it does so, the tenant must comply with the conditions precedent. If the tenant fails to comply, it does not suffer a

penalty or forfeiture of an existing tenancy. Equity will not intervene.

[65] The Court of Appeal for British Columbia relied, in part, on *Finch v Underwood* (1875), 2 Ch D 310, an English decision often cited in cases of failure to meet a precondition to renew a lease. In *Finch*, the lease contained an option to renew subject to the performance of covenants, one of which was the covenant to repair. No special circumstances were argued in that case. The court found that, at the time of renewal, there was a subsisting breach of the covenant to repair, and that, as a result, the tenant was not entitled to a renewal. James L.J. wrote at 314-5:

... The case is one of condition precedent; it is not a case of forfeiture A renewal of a lease is a privilege to which the tenant is to be entitled in certain circumstances and on certain terms.

...

No doubt every property must at times be somewhat out of repair, and a tenant must have a reasonable time allowed to do what is necessary: but where it is required as a condition precedent to the granting a new lease that the lessee's covenants shall have been performed, the lessee who comes to claim the new lease must shew that at that time the property is in such a state as the covenants require it to be. ...

[66] In *Illingworth*, the Court of Appeal for British Columbia upheld the Chambers judge's conclusion that relief from forfeiture was not available for a failure to renew, even if the tenant were able to demonstrate that termination of the lease would cause undue hardship, because the lease had expired and there was "no 'balance of the term of the lease' remaining" (at para. 142). The Court of Appeal found that the Chambers judge's conclusion accorded with its findings in *Clark Auto Body* that equitable intervention is not available in cases of failure to renew (see paras. 140 to 142).

Ontario caselaw

[67] In *Ross*, the Court of Appeal for Ontario found that it had a narrow jurisdiction to provide equitable relief in cases of failure to renew where a tenant has made diligent efforts to comply with the terms of the lease which are unavailing through no default of their own.

[68] The facts in *Ross* were as follows. In 1960, the landlord and the corporate tenant entered into a 30-year lease with respect to a warehouse. The lease was renewable for up to seven successive periods of ten years each, upon the same terms. The lease provided that, if the tenant wished to renew the lease, it had to deliver its notice of intent to do so, or provide it to the landlord by registered mail, at least 12 months before the expiration of the initial term of the lease, i.e. before June 1, 1989. There was evidence before the court that, in 1963, the landlord had sent a letter at the warehouse informing the tenant of his change of address. There was also evidence before the court that the landlord had asked the tenant to send all rent payments under the lease to his bank. In addition, there was evidence that the address of a specific branch of that bank had been used as the landlord's address on one occasion in relation to an insurance policy covering the leased property. On April 14, 1989, the tenant sent formal notice of its intent to renew the lease to the landlord by registered mail at the address appearing on the lease, which was no longer the landlord's address. The letter could not be delivered and was returned to the tenant. On April 25, 1989, the tenant sent the formal renewal notice by courier to the landlord's bank because it was confident the bank would redirect it to the landlord. There was also evidence on which a court could conclude that the bank had sent the letter to the landlord by regular mail on April 26, 1989. The landlord's

evidence was that he did not receive the notice until June 12, 1989, when a copy of it was provided to him at a meeting at the warehouse.

[69] One of the tenant's arguments was that, if it did not deliver the notice of renewal in accordance with the terms of the lease, it should be granted relief in equity considering all the circumstances. The Court of Appeal recognized, at 639-40, that courts have a narrow jurisdiction to grant equitable relief in cases of failure to meet a condition precedent to renew a lease:

If it should be held that Eaton did not deliver the notice of renewal in accordance with the terms of the lease, Eaton submits that it should be granted relief in equity with respect to the consequences of this failure. The jurisdiction to grant such relief is a narrow one. It is referred to in 27 Hals., 4th ed., para. 359, fn 1, which is considered by the New Brunswick Court of Appeal in *Saint John Shipbuilding & Dry Dock Co. v. National Harbours Board* (1983), 48 N.B.R. (2d) 27 at p. 29, and also in Lang, "Forfeiture of Interests in Land" (1984), 100 Law Q. Rev. 427 at pp. 448-52. It appears to be clear that at least one condition necessary for the jurisdiction to be exercised in favour of a tenant who seeks to be relieved from the consequences of failure to comply with the requirements of the lease respecting the exercise of the option of renewal is that the tenant has made diligent efforts to comply with the terms of the lease which are unavailing through no default of his or her own. See Lang, "Forfeiture of Interests in Land", *supra*, at p. 448 referring to Chernov, *Tenancy Law and Practice*, 2nd ed. (1980), at pp. 158-61, and, in addition to the decisions cited in fn 79 of the Lang article, *Reid v. Blgrave* (1831), 9 L.J.O.S. Ch. 245 at p. 248, which is referred to in *Affiliated Realty Corp. v. Sam Berger Restaurant Ltd.* (1973), 42 D.L.R. (3d) 191 at p. 201, 2 O.R. (2d) 147 (H.C.J.) [my emphasis]

[70] However, the majority of the Court of Appeal found that the tenant had not met the necessary precondition to the exercise of its jurisdiction because nothing prevented it from giving its renewal notice in accordance with the lease, i.e., by registered mail, or, alternatively, from delivering it directly to the landlord as specifically provided in the

lease. The Court of Appeal also found that the tenant had not made any efforts to obtain the landlord's current address to ensure notice was provided to him. Therefore, equitable relief was not available to the tenant.

[71] The Court of Appeal for Ontario relied in part on the decision of the New Brunswick Court of Appeal to arrive at its decision. In *Saint John Shipbuilding & Dry Dock Co v Canada (The National Harbours Board)* (1983), 48 NBR (2d) 27, cited in *Ross*, the tenant had inadvertently missed the contractual deadline to provide notice of its intention to renew the lease. As a result, the landlord informed the tenant that its lease had terminated. The tenant filed an application for relief of forfeiture of its right to renew the lease². The application judge granted the relief sought by the tenant. The landlord appealed the decision. The New Brunswick Court of Appeal allowed the appeal and reversed the application's judge's decision. In doing so, the Court of Appeal found that equitable relief is not available to a tenant who fails to provide notice of its intention to renew a lease within the time provided for in the lease save under special circumstances. The Court of Appeal did not elaborate on what those special circumstances could be as it found they were not applicable in that case. The Court of Appeal relied on English caselaw to explain why, in absence of special circumstances, equity will not intervene and will not force parties into a new contractual relationship (lease) that, by their own conduct, they have failed to create:

[4] There is long standing authority for the proposition that a tenant wishing to exercise an option to renew a lease must comply with the conditions in the lease as to the time of its exercise. Thus, if the covenant for renewal requires the tenant to give notice of his intention to take a renewal before the determination of the term, the tenant will lose his right if

² Equitable relief was sought under s. 26(3) of the *Judicature Act*, RSNB 1973, c J-2, which is almost identical to s. 13 of the Yukon *Judicature Act*.

he fails to give the notice in time. Nor will relief be given in equity against failure to give the notice in time save under special circumstances: see 27 *Halsbury's* (4th ed.), p. 92, para. 114, and p. 279, para. 359. None of the cases cited in *Halsbury* as examples of special circumstances has any resemblance to the facts of the present case. [my emphasis]

[72] The finding of the Court of Appeal for Ontario in *Ross* regarding the existence of a limited jurisdiction to grant equitable relief in cases of failure to meet the preconditions to renew a lease was followed in *120 Adelaide Leaseholds Inc v Oxford Properties Canada Ltd*, [1993] O.J. No. 2801 (ONCA) at para. 9; *1383421 Ontario Inc v Ole Miss Place Inc*, [2003] O.J. No. 3752 (ONCA); and more recently in *McRae Cold Storage Inc v Nova Cold Logistics ULC*, 2019 ONCA 452 at para. 10.

[73] However, in *Mapleview-Veterans Drive Investments Inc v Papa Kerollus VI Inc*, 2016 ONCA 93 at paras. 53-56, the Court of Appeal for Ontario acknowledged there were two competing lines of authority on whether a court can grant equitable relief from failure to comply with a covenant that is a condition precedent to the renewal of a lease³. However, it concluded it did not need to resolve the issue because the respondent was not entitled to the benefit of equitable intervention on either approach. In *660 Sunningdale GP Inc v First Source Mortgage Corp*, 2024 ONCA 252, the Court of Appeal also noted the two diverging lines of cases but determined that it did not need to attempt to resolve the conflict because the circumstances of that case did not involve property rights or a failed attempt to exercise an option to renew.

³ The Court of Appeal for Ontario noted, at para. 53, that in *Re Pacella and Giuliana* (1977), 16 OR (2d) 6 at 8, it had decided that a court “has power to relieve against forfeiture, but no power to excuse performance of conditions precedent” in a mortgage renewal case.

Conclusion

[74] Having regard to all of the circumstances of this case, I am of the view that I do not need to determine which line of cases to follow because, as explained below, I find that Arctic Colour is not entitled to the benefit of equitable intervention, even under the approach taken by the Court of Appeal for Ontario, which allows for equitable relief but only on the precondition that “the tenant has made diligent efforts to comply with the terms of the lease which are unavailing through no default of his or her own”.

(b) Should Arctic Colour be granted relief from its failure to renew?

[75] It is not disputed that Arctic Colour had an option to renew the 2022 Lease for up to five additional one-year terms, with a potential final end date of April 30, 2028, provided it gave timely written notice to Mr. Grove of its intention to renew, “duly and regularly pa[id] the Rent, and perform[ed] all and every of the covenants and agreements” in the 2022 Lease. Section 2.2 of the 2022 Lease reads as follows:

2.2 Term

Subject to the terms and conditions of this Lease, the Tenant will be entitled to have and to hold the Premises for the Term. If the Tenant duly and regularly pays the Rent and performs all and every of the covenants and agreements herein contained on the part of the Tenant to be paid, observed and performed, the Tenant shall have the option to renew the lease for five additional one (1) year terms following expiry of the Term (each a “Renewal Term”), provided the Tenant shall have given written notice to the Landlord in that regard not more than twelve (12) months and not less than six (6) months prior to the expiry of the Term or the Renewal Term. For clarity, the Landlord acknowledges that the Tenant is opting to renew for the first renewal term commencing May 1, 2023, and that no further notice is required as per that particular one (1) year renewal term. The Renewal Term shall be on the same terms, provisos, covenants, and agreements herein contained, save for any adjustment in Rent as contained in section 2.3 below.

Where all five (5) one (1) year renewals are opted for, the end date of the lease shall be April 30, 2028. [my emphasis]

[76] As per its terms, the 2022 Lease automatically renewed for a period of one year on May 1, 2023.

[77] It is not disputed that Arctic Colour validly gave written notice to Mr. Grove of its intent to renew the 2022 Lease, for a second one-year term, before its deadline to do so, which Mr. Grove extended to December 31, 2023.

[78] However, Arctic Colour concedes that, by April 30, 2024, it was in breach of the lease because it had not completed all the repairs it was required to make under the lease. Arctic Colour also concedes that, as a result, it did not meet all the conditions precedent to renew the lease and, if relief from failure to renew is not granted, the lease terminated on April 30, 2024.

Positions of the Parties

Arctic Colour

[79] While Arctic Colour concedes it was in breach of the 2022 Lease, it submits that, having regard to the totality of the circumstances, including its reasonable expectations of a lengthy tenancy, its significant investments into the Property on the basis of its reasonable expectations, the steps already taken by Arctic Colour to remedy most of the deficiencies and its ongoing commitment to remedying the few and small repairs still outstanding as well as to addressing Mr. Grove's concerns regarding its management personnel on the ground, it is just for the Court to grant it relief from failure to renew.

[80] More specifically, Arctic Colour submits that it has shown it is willing and able to remedy the few outstanding repairs (breaches). Arctic Colour submits that it took the necessary steps to have all the required repairs completed before the end of the lease

but, unfortunately, a few minor repairs remain outstanding due to unforeseen circumstances beyond its control, i.e., the unavailability of materials and contractors to complete the repairs before the end of the lease term. Arctic Colour also points out that it has taken active steps to ensure the small number of outstanding deficiencies, none of which pose a safety risk, be remedied.

[81] In addition, Arctic Colour states that, at the beginning of April 2024, it submitted a written plan to Mr. Grove for a new lease that addresses the concerns he had expressed regarding Arctic Colour's management personnel on the ground. Arctic Colour submits that it has identified a new manager in the Yukon and has proposed ways to ensure ongoing communications with Mr. Grove and responsiveness on its part. Arctic Colour points out that it did replenish the security deposit shortly after Mr. Grove's meetings with Mr. Yang in February 2024 and has proposed to increase the security deposit to \$30,000.

[82] Arctic Colour submits it agreed to make Mr. Grove's parcel of land the base of its tourism business and to make a significant capital investment on his parcel of land on the mutual understanding that it could rent the Property long-term and utilize the Property for its intended commercial purpose. Arctic Colour submits that the fact Mr. Grove entered into several lease agreements with Arctic Colour reveals any past dispute was resolved to the satisfaction of both parties. In addition, Mr. Grove's decision to continue entering into leases reflects the ongoing assurances he has provided to Arctic Colour that it could rent the Property long term. Arctic Colour's reasonable expectations were renewed in February 2024 when Mr. Grove expressed to Mr. Yang that he was still interested in a long-term lease agreement with Arctic Colour. Arctic

Colour submits that it has invested over \$2.8 million in the Yukon, including over \$1.2 million in the construction and improvement of the main building and the duplexes. Arctic Colour submits it will lose its substantial investment if relief is not granted because, as per the terms of the lease, the buildings will remain in the possession of Mr. Grove. Arctic Colour submits that, without any return on its capital investment in the Property and the buildings, it will not have the liquidities nor the financial capacity to finance the construction of new buildings to host its guests. Consequently, it will not be able to continue its tourism operations in the Yukon and will be exposed to significant contractual liabilities if relief is not granted. Arctic Colour points out that it has been a valuable partner to many Yukon businesses and has positively contributed to the Yukon tourism sector and economy since it started its operations in this territory. Arctic Colour stresses that, if relief is not granted, it stands to lose the viability of its business as a whole.

[83] Finally, Arctic Colour submits that, considering all the circumstances, the Court should exercise its discretion to grant relief from its failure to renew.

Wayne Grove

[84] Mr. Grove submits that relief from failure to renew should not be granted to Arctic Colour because this is not a case where the tenant has been unable to comply with the conditions precedent to its option to renew the lease through no fault of its own.

[85] Mr. Grove submits that Arctic Colour is responsible for the situation it finds itself in because it only started taking steps to address the deficiencies long after it should have started acting on them. Mr. Grove submits that Arctic Colour has known about the deficiencies as well as the necessity to address them since early 2023. Mr. Grove adds

that Arctic Colour had more than a year to remedy the deficiencies. However, despite the government authorities' notices, as well as his ongoing requests and reminders, Arctic Colour only started addressing the required repairs and maintenance after the Fire Marshal closed the buildings on March 14, 2024. In addition, Mr. Grove submits that Arctic Colour did not provide any reason why it was unable to comply with its lease and effect the required repairs and maintenance in 2023, when it should have done so.

[86] Mr. Grove submits that Arctic Colour cannot blame its inaction solely on its personnel on the ground because upper management (Mr. Yang) was aware of the situation throughout 2023 and early 2024 and did not take the necessary measures to remedy the situation in a timely manner.

[87] Mr. Grove submits that Arctic Colour invested in the property knowing it was subject to the lease, and it knowingly jeopardized its investment by letting the buildings go into disarray and ignoring government authorities' notices, as well as his repeated notices that repairs to and maintenance of the buildings were required. Mr. Grove submits that it is not unconscionable in the circumstances to let the contractual rights of the parties govern.

[88] Mr. Grove submits that the expectations of the parties are reflected and governed by the terms of the lease agreements. Mr. Grove points out that the 2016 Lease was for an initial term of five years with an option to renew for five years. Therefore, Arctic Colour knew it could expect having possession of the Property for a possible total of ten years when it invested in the main building and the duplexes, if it complied with the terms of the lease. Therefore, 80% of Arctic Colour's long-term expectations have come to pass. In addition, Mr. Grove submits that his actions, over the years, including his

decisions to enter into new lease agreements with Arctic Colour despite its repeated breaches, reveal he gave Arctic Colour many chances and did everything he could to make their landlord-tenant relationship work. Mr. Grove submits he warned Arctic Colour on several occasions that he would not be amenable to renewing the lease if Arctic Colour did not replenish the security deposit and did not address the required maintenance and repairs, which raised real safety concerns for Arctic Colour's clients and employees as well as liability concerns for Mr. Grove and Arctic Colour. Mr. Grove also submits that he warned Arctic Colour more than once that he would terminate the lease early if the Fire Marshal shut down the buildings because Arctic Colour did not address the deficiencies as it is its responsibility under the lease. Mr. Grove does not deny that he was still open to renewing the lease on a long-term basis when he met Mr. Yang in February 2024, provided Arctic Colour remedied the breaches and actively addressed the concerns and issues he had raised. However, Mr. Grove states that Arctic Colour did not take active and timely steps to remedy the deficiencies and the closure of the buildings by the Fire Marshal a month after the meeting was the final straw for him. Mr. Grove submits that he gave much notice to Arctic Colour to bring itself into compliance, but it failed to do so. Mr. Grove submits that the dismissive and disdainful attitude of Arctic Colour's representatives in the Yukon towards him, as well as Arctic Colour's continued false assurances, have eroded their landlord-tenant relationship in an irreparable manner. Mr. Grove further submits that the proposal made by Arctic Colour in April was, essentially, too little too late.

[89] Finally, Mr. Grove submits that there is no evidence before the Court to support Arctic Colour's assertion that it has no ability to continue with its tourism business if this

lease is no longer available. There is no evidence regarding Arctic Colour's financial situation before the Court, and there is no evidence that Arctic Colour has looked into or attempted to continue its business in some other form. Mr. Grove points out there are many different ways to conduct northern lights tours, such as through wall tent accommodations or in partnership with local hotels.

Analysis

[90] As stated earlier, even under the more generous approach taken by the Court of Appeal for Ontario in cases of failure to renew, the jurisdiction of a court to grant equitable relief in circumstances where there has been a failure to comply with a condition precedent to the renewal of a lease is quite limited. As a precondition to equitable intervention, a tenant must demonstrate that they have made diligent efforts to comply with the terms of the lease, which are unavailing through no fault of their own.

[91] Even if this Court followed the approach taken by the Court of Appeal for Ontario, I am of the view that the circumstances of this case do not warrant equitable intervention of the Court because the failure to renew is attributable to Arctic Colour's failure to act with due diligence.

Maintenance and repairs of the Property (including the main building and the duplexes), a condition precedent to the renewal of the lease

[92] Section 6.1 of the 2022 Lease clearly stipulates that the tenant, Arctic Colour, is solely responsible for the maintenance and repairs of the Property, including the main building and the duplexes. Under the lease, Arctic Colour must, at its own costs, repair, maintain, and keep in a state of good repair the road, the buildings, and other improvements located on the Property. The landlord, Mr. Grove, has no obligations in that regard.

6.1 Maintenance Repair Responsibilities

The Landlord will not be obliged to report, maintain, replace, or alter the Premises or the improvements or any part thereof. The Tenant hereby assumes sole responsibility for the condition, operation, maintenance, repair, and replacement of any improvements located on the Premises. For further clarity, the Tenant shall, at its cost, be responsible to mow the grass on the Premises and keep it reasonably maintained during the Term.

The Tenant, at its costs, will repair and maintain and will keep in a state of good repair and maintenance the Road and the buildings and improvements on the Premises including all appurtenances, equipment, fixtures, walls, foundations, roofs, sidewalks, yards, heating and air-conditioning equipment, water and sewer mains and connections and plumbing, electrical and gas pipes and conduits in, upon, or about the Premises, to the same extent and in the same manner as a prudent and careful owner would do, and whether such repairs and maintenance is interior or exterior, structural or non-structural, ordinary or extra-ordinary, foreseen or unforeseen. The terms “repair” and “maintenance” and variations thereof as used in this Lease are hereby deemed to include replacements, renewals, alterations, additions, substitutions, and improvements when same are necessary for the Tenant to comply with its obligations pursuant to this Part 6.1. All repairs will be in all respects to a standard at least substantially equal in quality of material and workmanship to the original work and material in the Improvements and will meet the lawful requirements of all Statutory Authorities. For clarity, the Tenant acknowledges that the main building requires levelling and that levelling is the responsibility of the Tenant pursuant to this section.

[93] In addition, s. 6.3 clearly sets out that Arctic Colour has an obligation to promptly, upon notice by the Landlord, make and do all repairs and maintenance it has an obligation to perform under s. 6.1 of the lease.

6.3 Repair According to Notice

Without restricting the generality of Part 6.1, the Tenant, promptly upon notice by the Landlord, will make and do all

repairs and maintenance which it is obliged to make and do pursuant to Part 6.1.

[94] Section 6.5 of the lease grants Mr. Grove the right to enter the Property and the buildings to inspect them and to effect the maintenance and repair that Arctic Colour fails to perform after being notified to do so at Arctic Colour's costs. However, Mr. Grove has no obligation to do so.

6.5 Landlord's Right to Repair

If the Tenant fails to observe or perform its obligation to repair and maintain, and if the Landlord first delivers to the Tenant 10 days' written notice of its intention to do so except in the case of emergency, the Landlord may cause the Landlord's Representative to enter upon the Premises for the purpose of remedying the default. The Tenant will pay to the Landlord, on demand, the Landlord's costs of so correcting any default. The Landlord, in so correcting, will not be liable for any inconvenience, disturbance, loss of business, or other damage resulting therefrom.

[95] The evidence reveals that Mr. Grove, with Arctic Colour's consent, ensured that the work necessary to repair the foundation of the main building, as required by Building Safety, was performed in the spring and early summer of 2023. In addition, at or around the same time, he obtained the required approvals for the septic system. Mr. Grove was reimbursed for the vast majority of these expenses through the safety deposit.

[96] In addition, s. 6.2. of the Lease specifically gives Mr. Grove, in consultation with Arctic Colour, the possibility to renovate or make improvements to the main building at his costs. The evidence reveals that Mr. Grove, with Arctic Colour's consent, has availed himself of that possibility by undertaking and paying for (with some funding from a federal development agency) the renovations of the kitchen to upgrade it to commercial standards.

6.2 Main Building

The Landlord may, in consultation with the Tenant and at his cost, renovate, make improvements to and/or complete the Main Building during the Term and any Renewal Terms, provided that such renovation will occur in the off-season of the business and not unreasonably interfere with same, and such renovation shall be consistent with the business needs of the Tenant for the Main Building during the Term and any Renewal Term.

[97] Arctic Colour acknowledges that, at the end of the term of the lease- April 30, 2024, it was in breach of the lease because the following repair and maintenance work, which it had an obligation to perform promptly at its own costs, were still outstanding:

- the electrical work required to provide heat to the crawl spaces of the duplexes had not been completed;
- the hole in the deck caused by fire had not been repaired; and
- broken doors had not been replaced, and the siding had not been repaired.

Steps taken by Arctic Colours to remedy the deficiencies.

[98] The evidence reveals that none of the repairs and maintenance work that Arctic Colour had the obligation to perform under the 2022 Lease was completed before the Fire Marshal closed the premises on March 14, 2024.

[99] Mr. Yang's evidence is that Arctic Colour took steps to complete the outstanding work prior to the end of the lease. However, Arctic Colour encountered unexpected difficulties due to the unavailability of materials and contractors that made it impossible to complete the work before May 1, 2024. In the proposal of April 3, 2024, Mr. Yang wrote that Arctic Colour had hired a carpenter to repair the deck. However, the carpenter was unable to source the matching materials, and Arctic Colour was in the

process of hiring another carpenter. Mr. Yang added that Arctic Colour welcomed any recommendation Mr. Grove may have in that regard. With respect to the broken doors and siding repairs, Mr. Yang wrote in the proposal of April 3rd, that Arctic Colour planned to hire a professional contractor to conduct regular checks for maintenance purposes and that it would welcome any recommendation Mr. Grove may have in that regard. With respect to the heating appliances for the duplexes, Arctic Colour indicated that it had obtained a quote from electricians approved by Mr. Grove, who could start the work immediately after the tourist season.

[100] In addition, Mr. Yang's evidence is that he travelled to the Yukon to meet with Mr. Grove in February 2024, recognizing that there had been a breakdown with on-site management. According to his affidavit, Mr. Yang came out of that meeting believing he and Mr. Grove had reached an agreement and were both committed to a long-term relationship. Unfortunately, things moved quickly after that meeting, according to Mr. Yang, with the Fire Marshal attending the premises the following month and ordering the closure of the buildings until Arctic Colour was able to correct most of the deficiencies on or around March 27, 2024.

[101] However, there is no evidence before me regarding the timing of Arctic Colour's inquiries and requests for quotes from contractors to perform the required outstanding repairs. At the hearing, I asked counsel for Arctic Colour why the repairs could not have been done earlier, counsel answered that the failure to address the defaults throughout 2023 is a management issue. She added that Arctic Colour addressed this issue by removing the manager on the ground and appointing someone else. She added that

Arctic Colour is in the process of retaining appropriate long-term management to do the work on the ground and that Arctic Colour is committed to finding the right person.

[102] The letters sent by Mr. Grove's counsel to Arctic Colour and its counsel reveal that Arctic Colour has known for the best part of 2023 that it was required to complete the above-noted outstanding repairs.

[103] The replacement of broken doors and the siding repairs were identified as work Arctic Colour needed to attend to as early as February 6, 2023, in a letter sent by counsel for Mr. Grove to counsel for Arctic Colour. It was again specifically identified as outstanding in a letter dated July 10, 2023, to counsel for Arctic Colour and in letters dated October 4, 2023, and November 4, 2023, to a representative of Arctic Colour in the Yukon with a copy to counsel for Arctic Colour.

[104] The hole in the deck of the main building caused by fire was first noticed by Mr. Grove in May 2023 while he was under the deck dealing with the repairs of the foundation. Mr. Grove had not seen the damage before because Arctic Colour's representatives had placed a cooler over the hole in an attempt to hide it. Mr. Grove requested that the hole be repaired. Mr. Grove's evidence on this issue is uncontradicted. The repair of the deck, "charred through fire" was identified as outstanding work in the letters of July 10, 2023, October 4, 2023, and November 24, 2023.

[105] In addition, back in January 2023, the Deputy Fire Marshal advised that Arctic Colour could not use portable heaters to heat the crawl spaces under the duplexes. Mr. Grove's evidence on that point, which is uncontradicted, is that the heaters were placed under the crawl spaces by Arctic Colour to prevent the pipes under the duplexes

from freezing. The requirement that this work be addressed was highlighted in the letters that counsel from Mr. Grove sent on February 6, 2023, July 10, 2023, October 4, 2023, and November 24, 2023.

[106] Not only did Arctic Colour fail to perform the maintenance and do the repairs required to address the crawl space heating issue in a timely manner, i.e. before the next winter (2023/2024), it again installed portable heaters under the duplexes in contravention to the Deputy Fire Marshal's orders. Arctic Colour's offending behaviour was revealed during the Deputy Fire Marshal's inspection on March 6, 2024. Indeed, in his email of March 7, 2024, to Arctic Colour's representatives and to Mr. Grove, the Deputy Fire Marshal stated that:

The inspection found that none of the deficiencies (orders) were remedied, nor attempted to be remedied (other than in the kitchen area of the Assembly building that is under construction). In-fact, a number of the portable heaters located under the Housing Units (Guest Cabins) were plugged in and being utilized. Prior to the inspection being completed the Deputy Fire Marshal ensured all improper extension cords and portable heaters were removed from the Housing Units.

...

Because of the negligence of not remedying past orders, and due the [as written] electrical issues found. This email and inspection report has been CC to Yukon Government's Building Safety for review. [my emphasis]

[107] By the time the 2022 Lease ended on April 30, 2024, more than a year after this important deficiency was noted, Arctic Colour had still not started the work required to heat the duplexes' crawlspaces to prevent the pipes from freezing.

[108] In my view, the chronology of events reveals that Arctic Colour had plenty of time to address the outstanding maintenance and repairs it was required to perform promptly

upon notice, pursuant to the terms of the lease. However, Arctic Colour was not diligent in attending to its obligations. In that context, the unavailability of materials and contractors is not an unforeseen event. It became an issue because Arctic Colour waited until the last minute to attend to the repairs. In my view, the situation Arctic Colour finds itself in is of its own making.

[109] While Arctic Colour did not specifically plead unjust enrichment or plead that Mr. Grove waived its breaches by his conduct, counsel for Arctic Colour nonetheless invited me to consider all the circumstances of this case, including the conduct of the parties, the substantial financial investment that Arctic Colour made in the premises and the impact on Arctic Colour to determine whether to grant equitable relief from failure to renew despite the very limited test enunciated by the Court of Appeal for Ontario.

[110] However, there is no financial information before me to support Mr. Yang's broad statement that Arctic Colour would find itself in a precarious financial situation or that Arctic Colour would face substantial liabilities if the 2022 Lease was not reinstated. Also, there is no evidence before me that Arctic Colour has looked into other possibilities or ways to operate its tours.

[111] As for the loss of its substantial financial investment, Arctic Colour has had possession of the Property for eight years and has been able to use the buildings for their intended commercial purposes since they were completed. Also, Arctic Colour was well aware that the main building, as well as the duplexes, as built (in certain circumstances), would remain the property of Mr. Grove at the end of the lease, as per its terms. Arctic Colour was also aware of the short duration of the lease and of the preconditions to its renewal when it entered into the 2022 Lease. The problem, as

revealed by the evidence, is that Arctic Colour ignored its responsibilities under the lease for too long.

[112] In addition, Arctic Colour's breaches cannot solely be blamed on local management. The evidence reveals that upper management (Mr. Yang) was aware there were issues with management on the ground and that the deficiencies and repairs were not being addressed. While counsel for Arctic Colour mentioned on more than one occasion in his emails to counsel for Mr. Grove that Mr. Yang was aware of the issues and had given directions to management on the ground to cooperate with Mr. Grove; the number of letters counsel for Arctic Colour received throughout 2023 should have alerted upper management that more was needed to ensure Arctic Colour complied with its contractual obligations. However, no concrete measures were taken by upper management for over a year.

[113] Finally, while there may have been discussions between Mr. Yang and Mr. Grove about the possibility of a long-term relationship in February 2024, s. 1.6 of the lease clearly stipulates that there can be no waiver by conduct, as recognized by counsel for Arctic Colour at the hearing. In any event, based on the evidence before me, Mr. Grove's openness to continue a commercial relationship with Arctic Colour in February 2024, if Arctic Colour's was able to establish that it could abide by the terms of the lease, including its obligation to maintain and repair the Property as well as the main building and the duplexes, in a timely manner and replenish the security deposit, does not constitute a waiver.

Conclusion

[114] In my view, the circumstances of this case do not warrant that the Court exercises its equitable jurisdiction, if any, to remedy Arctic Colour's failure to meet the preconditions to the renewal of the lease because the evidence reveals Arctic Colour did not make diligent efforts to comply with the terms of the lease.

[115] This matter is one where the contractual rights and obligations of the parties are to be given force and effect.

c. Should Arctic Colour be granted relief from forfeiture?

[116] Considering the parties agree that the lease expired pursuant to its terms on April 30, 2024, and considering I found Arctic Colour is not entitled to relief from its failure to renew, the question of whether Arctic Colour is entitled to relief from forfeiture for the remainder of the term of the lease no longer arises.

CONCLUSION

[117] Based on the findings that the lease ended on April 30, 2024, and that Arctic Colour is not entitled to relief from its failure to meet the conditions precedent to renew the 2022 Lease, the petitioner, Wayne Grove, is entitled to the following relief:

- a writ of possession as against Arctic Colour with respect to the Property, including the main building and the duplexes;
- a declaration that Arctic Colour has been overholding the Property, including the main building and the duplexes, since May 1, 2024;
- an order that Arctic Colour pays rent to Mr. Grove in accordance with s. 14.1 of the 2022 Lease for the period for which it has been overholding the Property, including the main building and the duplexes;

- a declaration that Arctic Colour’s obligation to repair the Property, including the main building and the duplexes, in accordance with the lawful requirements of statutory authorities survives the end of the lease and that, as a result, Arctic Colour pay Wayne Grove compensation for the cost of completing the work to meet those statutory requirements; and
- an order that Wayne Grove may apply for summary accounting of the amount of compensation due to him on account of the overholding and for completing the work required to meet the statutory requirements.

[118] Finally, costs of this petition are awarded to Mr. Grove because he is the successful party in this proceeding.

A handwritten signature in blue ink, appearing to read "John Campbell", is written over a light blue rectangular background.

CAMPBELL J.