

- [4] For the reasons that follow, I find that the tenant was required to occupy the premises no later than April 24, 2024. The tenant breached the lease in several ways, including by not occupying the premises. The landlord is entitled to damages from the tenant. The parties agree that the tenant is a single-purpose corporation that is not currently operating and has no assets. Practically, the landlord is looking to recover from the guarantor under the indemnity agreement he signed. I find that the landlord is entitled to judgment against the guarantor for all amounts owed by the tenant.

Procedural history

- [5] The landlord issued the statement of claim in this proceeding on August 11, 2020. The defendants delivered their statement of defence on October 20, 2020. The plaintiff delivered its reply on October 26, 2020.
- [6] The parties brought cross-motions for summary judgment, which were returnable before Akbarali J. on May 9, 2022. The parties identified that one of the defences advanced by the defendants in their motion for summary judgment was not pleaded, and the plaintiff wished to consider the need to obtain additional evidence. Justice Akbarali adjourned the motions for summary judgment.
- [7] The matter came back before Akbarali J. on June 29, 2023. She directed the matter be determined at a one-day summary trial in Fall 2024. The summary trial proceeded before me on October 8, 2024. The parties reached an extensive agreed statement of facts and agreed on the calculation of damages (if liability was found). This allowed me to hear the case efficiently, without witnesses, in one day.

Facts

- [8] The parties entered into a very useful agreed statement of facts. I will not reproduce the agreed statement of facts in its entirety, but I have considered all of the facts contained in it. In my view, the most important agreed facts are as follows.
- [9] On October 8, 2019, the landlord and the tenant signed the lease for 4,144 square feet of space at the property. Schedule F to the lease was an indemnity agreement, which Mr. Savojbolaghi signed. The lease gave the tenant a ten-year term intended to commence on May 1, 2020, and expire on April 30, 2030. The tenant delivered a deposit of \$58,477.50.
- [10] On November 28, 2019, the landlord notified the tenant that the Possession Date, which was the date the Fixturing Period would commence, would be January 2, 2020. On that date, the tenant was to begin the fixturing process, provide drawings, permits, and proof of insurance. On January 6, 2020, the plaintiff objected to the landlord's requirement that it begin the fixturing process before the landlord completed its work.
- [11] On January 20, 2020, the landlord advised the tenant that the Possession Date would be extended to February 3, 2020. The landlord and the tenant disagreed as to whether the premises were ready for the tenant to begin the fixturing process. The tenant then took the position that it would not take possession until all of the landlord's work was complete.

- [12] On April 24, 2020, the landlord completed the last of the outstanding items. The parties agree that by mid-April 2020, the landlord's work was sufficiently complete for the tenant to begin fixturing. The tenant did not take possession or begin the fixturing process at this time.
- [13] On June 5, 2020, the landlord served the tenant with a notice that it had defaulted under the lease and indicated that the tenant had to cure the default by taking possession no later than June 20, 2020. The tenant did not do so.

Issue One: Did the tenant fail to take possession of the premises as required by the lease?

- [14] It is common ground that the tenant never took possession of the property. The key dispute between the parties turns on whether the lease required the tenant to do so. This action turns on the meaning of ss. 3.01, 3.01.1, 13.02.2, and Schedule C – Construction: Landlord's Work and Tenant's Work, in the lease.

A. *Position of the parties and conclusion*

- [15] The landlord submits that the lease required the tenant to occupy the premises and to begin its fixturing period on February 3, 2020, and that the term of the lease commenced on June 2, 2020. On June 5, 2020, the landlord provided the opportunity to the tenant to remedy its defaults by taking possession by June 20, 2020, and completing the fixturing no later than October 17, 2020. The tenant failed to take this last opportunity to take possession of the premises and repudiated the lease.
- [16] The tenant submits that the landlord improperly attempted to compel it to take "joint occupancy" of the premises, that the landlord's notice of a February 3, 2020, possession date was invalid, and that the landlord never provided a valid possession date. The tenant submits that the landlord was obligated to complete all of its required work under the lease, to the satisfaction of the tenant, before the tenant was obliged to begin the fixturing work.
- [17] For the reasons that follow, and taking the tenant's case at its highest, I accept the submissions of the landlord. I find the tenant was obliged to take possession of the premises no later than mid-April and it repudiated the lease when it failed to do so. I do not accept the tenant's interpretation of the lease, which is not consistent with the words the parties used in the lease and cannot be reconciled with the text of the written agreement, read as a whole. In my view, the "time is of the essence" clause is of no assistance to the tenant. Similarly, the agreement is not ambiguous, and I need not resort to the doctrine of *contra proferentum*.

B. *Principles of contract interpretation*

- [18] The lease was a contract negotiated between the parties. The lease is not a standard form contract. The parties agree that the lease was prepared by counsel for the landlord.
- [19] The usual rules of contract interpretation apply to the lease. The Court of Appeal for Ontario has held that when interpreting a contract, a judge should:

- a. determine the intention of the parties in accordance with the language they have used in the written document, based upon the “cardinal presumption” that they intended what they said;
- b. read the text of the written agreement as a whole, giving the words used their ordinary and grammatical meaning, in a manner that gives meaning to all of the agreement’s terms and avoids an interpretation that would render one or more of its terms ineffective;
- c. read the contract in the context of the surrounding circumstances known to the parties at the time of its formation. The surrounding circumstances, or factual matrix, include facts that were known or reasonably capable of being known by the parties when they entered into the written agreement, such as facts concerning the genesis of the agreement, its purpose, and the commercial context in which it was made. However, the factual matrix cannot include evidence about the subjective intention of the parties; and
- d. read the text in a fashion that accords with sound commercial principles and good business sense, avoiding a commercially absurd result, objectively assessed.¹

[20] As Laskin J.A. noted in *City of Thunder Bay*, the “overriding principle is that the meaning of an agreement and the intent of the parties in entering into it must be derived from the words the parties used and the context in which they used those words.” Context (sometimes described as “the surrounding circumstances” or “the factual matrix”) almost always matters, because words rarely have meaning apart from their context.²

[21] The defendants urge that I adopt the principle of *contra proferentum* to interpret the lease. This principle states that where the meaning of a contract provision is ambiguous or uncertain, a court will construe the provision against the party who drafted it.³

¹ *Weyerhaeuser Company Limited v. Ontario (Attorney General)*, 2017 ONCA 1007, 13 C.E.L.R. (4th) 28, at para. 65, rev’d on other grounds, *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60, [2019] 4 S.C.R. 394; *Thunder Bay (City) v. Canadian National Railway Company*, 2018 ONCA 517, 424 D.L.R. (4th) 588, at paras. 30, 46; *Ottawa (City) v. ClubLink Corporation ULC*, 2021 ONCA 847, 159 O.R. (3d) 255, at para. 52; and *Dumbrell v. Regional Group of Companies Inc.*, 2007 ONCA 59, 85 O.R. (3d) 616, at para. 53.

² *City of Thunder Bay*, at para. 30.

³ *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888, at p. 900; *Eli Lilly and Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, at para. 53; *473807 Ontario Ltd. v. TDL Group Ltd.*, (2006) 271 D.L.R. (4th) 636 (Ont. C.A.), at para. 63.

C. *The surrounding circumstances known to the parties at the time of the contract*

- [22] Neither party emphasized the surrounding circumstances or factual matrix present in this case.
- [23] At the time the parties signed the lease, the landlord knew that the defendants wanted to establish an AllStar Wing & Ribs restaurant. The tenant knew that the premises constituted a gutted, empty unit. The parties understood that the space required a significant amount of work before the tenant could open the restaurant to the public. One of the purposes of the lease was to delineate which party was responsible to complete each necessary task.
- [24] Against this backdrop, on October 8, 2019, the parties signed a ten-year lease, with two five-year extensions at the option of the tenant. The lease covered 4,140 square feet.
- [25] I do not accept the defendants' submission that the COVID-19 pandemic is a surrounding circumstance that I can consider when interpreting the lease. Neither the pandemic, nor the restrictions on restaurant operations that followed, was a circumstance known to the parties on October 8, 2019.

D. *The key provisions of the lease: term, fixturing period, landlord's work, and tenant's work*

- [26] Section 3.01 of the lease sets out its ten-year term. By its terms, the lease commences on the earlier of the expiry of the "Fixturing Period" or the date the restaurant opened for business. The lease provided an estimated commencement date of May 1, 2020, but explicitly permitted the landlord to extend or amend that date if the premises were not ready to be occupied, or for a variety of circumstances beyond the landlord's control:

3.01 The term of the Lease (the "Term") will be for a period of ten (10) years, unless sooner terminated pursuant to other provisions of this Lease, commencing on the earlier of: (i) the expiry of the Fixturing Period (as hereinafter defined); or (ii) the date the Tenant opens for business in any part of the Leased Premises (the "Commencement Date") and to be fully completed and ended ten (10) years thereafter. If, for any reason, the Commencement Date is not the first day of the month, then the Term shall end ten (10) years following the first day of the month next following the month in which the Commencement Date occurs. The Commencement Date is currently estimated to be May 1, 2020. The Landlord may, upon written notice to the Tenant, extend and amend the Commencement Date from time to time where the Leased Premises will not be ready for occupancy by the Commencement Date or any extended Commencement Date if such delay has been caused in whole or in part by the effect of strikes, lock-outs, wars, riots, government embargoes, fires, floods or other catastrophes, acts of God, improper failure to supply or perform by the developer of the Leased Premises

or any of its sub-trades or suppliers, or other causes or restrictions considered as "force majeure" or reasons beyond the control of the Landlord. The Commencement Date may be extended for as long as such causes remain outstanding.

- [27] It is undisputed that the restaurant never opened for business, so that event did not trigger the commencement of the lease. Therefore, the key question is whether the Fixturing Period expired and triggered the commencement of the lease.
- [28] The tenant submits that the Fixturing Period never commenced or expired because the lease permitted the tenant to refuse to occupy the leased premises unless and until the landlord completed all the work the landlord was required to perform pursuant to Schedule C of the lease, which is titled Construction: Landlord's Work and Tenant's Work. The key provision reads as follows:

B. GENERAL REQUIREMENTS

Prior to the Tenant taking Possession of the Premises, the Landlord agrees to the following:

Provide a minimum of three (3) new rooftop HVAC units, a total of 25 ton capacity. All units shall have a separate disconnect switch located at the unit. All units shall have economizers.

Landlord to confirm the following exists within the Leased Premises: i

- i. Existing 4" sanitary line roughed-in capped within demised space.
- ii. Incoming domestic water service shall be minimum 2" copper piping complete with shut off valve, by-pass valves and water check meter capped at ceiling within demised space. Tenant responsible for plumbing distribution.
- iii. Existing floor - As is.
- iv. Complete fire alarm system as required by code for vacant space. Tenant to distribute per Tenant's floor plan.
- v. Main electrical service shall be 400 amp, 600 volt, 3-phase 4 wire service to disconnect switch. Distribution by Tenner.
- vi. Gas-Minimum 2" gas service with 7" water column of pressure and a minimum of 900 MBH, separately metered

and stubbed to space capped at ceiling at back of demised space as determined by the Landlord. Landlord to provide gas service from meter to HVAC units.

vii. Provide empty conduits (minimum 2" diameter) e/w pull cables for each of the cable TV and telephone systems from the service provider's closest service point to a demarcation point within the Premises as determined by the Landlord within the demised space.

- [29] The tenant submits that this provision should be interpreted to mean that it had no obligation to begin the fixturing process until all of the landlord's work was completed to its satisfaction. I disagree. This clause must be interpreted in light of the rest of the lease, which makes clear that the parties agreed that the tenant would commence the fixturing work while the landlord completed its work. I cannot accept the tenant's interpretation of Schedule C given the other terms of the lease discussed below.
- [30] The Fixturing Period is defined and explained in s. 3.01.1 of the lease. It is a 120-day period during which the tenant shall install its leasehold improvements and fixtures. When that 120-day period ends, the lease commences, and the tenant must begin to pay rent. The lease provided an estimated target date of January 2, 2020, for the start of the Fixturing Period but allowed the landlord to extend that date if necessary. In any event, according to the following provision in the lease, the Fixturing Period would begin the day that the "Landlord's Work is completed to a stage sufficient to permit the Tenant to commence fixturing," provided that the landlord gave a minimum of 30 days' notice:

3.01.1 Fixturing Period

The Tenant shall have a period of a maximum of one hundred and twenty (120) days, (the "Fixturing Period") during which the Tenant shall install all required leasehold improvements and fixtures in the Leased Premises, commencing on a date (the "Possession Date") that Landlord's Work is completed to a stage sufficient to permit Tenant to commence fixturing. The Fixturing Period is estimated to commence on January 2, 2000 (the "Possession Date"). In the event that the Landlord's Work is not completed to a stage sufficient to permit the Tenant to commence fixturing prior to the commencement of the Fixturing Period, the Commencement Date and the expiry date of the Term shall be extended by the length of such delay and the Landlord shall not be liable to the Tenant for any damages. The Landlord shall give the Tenant a minimum of thirty (30) days' prior written notice of the anticipated Possession Date.

During the Fixturing Period, the Tenant shall be responsible for the payment of utilities, garbage and waste removal, HVAC costs and any other services consumed on the Leased Premises but shall not

be responsible for the payment of Minimum Rent or Additional Rent. The Tenant shall be bound by all other terms and conditions of this Lease during the Fixturing Period (including, without limitation, the obligation to provide the Landlord with certificates of insurance). For clarity, the Fixturing Period shall expire upon the earlier of (1) the end of the foregoing one hundred and twenty (120) day period; or (1) the date immediately preceding the date that the Tenant opens for business in any part of the Leased Premises.

If the Tenant fails to take possession of the Premises within fifteen (15) days following the commencement of the Fixturing Period, the Landlord may, without prejudice to any of its other rights or remedies, at its option, terminate this Lease.

[31] The text of s. 3.01.1 poses a significant problem for the tenant's interpretation of the lease. The tenant submits that Schedule C means that it had no obligation to begin the Fixturing Period until the landlord had completely finished all of the landlord's work. That interpretation is difficult to reconcile with s. 3.01.1, which expressly states that the landlord need not complete all of its work prior to the commencement of the Fixturing Period. Rather, the landlord needed only to complete its work "to a state sufficient to permit the Tenant to commence fixturing." This clause strongly suggests that the parties agreed that there would be circumstances where the tenant and the landlord could each be working on their tasks at the same time.

[32] Section 13.02 of the lease is also relevant to the interpretive exercise. Section 13.02.1 clarifies that the landlord is only required to perform the work that is set out in Schedule C.:

13.02.1 The Tenant acknowledges that it has examined the Leased Premises and is familiar with the condition thereof and the permitted uses thereof. The Tenant agrees that there is no promise, representation, or warranty by the Landlord with respect to the Leased Premises or the construction thereof except as expressly set forth in the Lease and accepts the Leased premises on an "as is" basis. The Tenant agrees that the Landlord shall not be obligated or required to perform any work on or correct any condition of the Leased Premises prior to the Commencement Date or at any time thereafter, save as set forth in Schedule "C" hereof.

[33] Section 13.02.2(c) clearly contemplates the tenant and the landlord completing their work at the same time. First, the lease expressly gives the landlord the right to require the tenant's work prior to the completion of the landlord's work in any case where the nature or state of the work causes the landlord to consider it necessary or desirable. Second, the lease requires the tenant to ensure that its contractors and employees complete the tenant's work without interfering with the landlord's contractors and employees:

13.02.2(c) Prior to commencement of any work on the Leased Premises by or on behalf of the Tenant, the Tenant shall submit to the Landlord complete drawings and specifications which shall be subject to the Landlord's approval, such approval not to be unreasonably withheld. The Tenant's Work shall be performed at the expense of the Tenant and the Landlord shall have the right to require the Tenant to perform part of the Tenant's Work prior to completion of the Landlord's Work in any case where the nature or state of the work is such that the Landlord considers it necessary or desirable to do so. The Tenant's Work shall be carried out in a good and workmanlike manner and be subject to the approval of the Landlord. During the time that the Tenant is in occupancy of the Leased Premises for the purpose of carrying out the Tenant's Work, but prior to the Commencement Date, it shall be bound by all of the provisions of this Lease, except those requiring payment of rent or contribution in respect of taxes and operating costs, the Tenant shall, however, pay for the cost of all utilities consumed by it with respect to the Leased Premises. The Tenant shall cause its employees and contractors to do their work so as not to interfere with the Landlord's contractors and employees. [Emphasis added.]

- [34] Section 13.02.2(c) poses another serious challenge to the tenant's interpretation of the lease. Under the tenant's interpretation of the lease, it could refuse to begin fixturing unless and until it was satisfied that the landlord had completed all of its work. However, the lease expressly gives the landlord the right to require the tenant to start its work before the landlord is finished. It also expressly contemplates that both the tenant and the landlord could have contractors and employees on site as the tenant's work is being completed, and gives primacy to the landlord's contractors and employees.
- [35] I do not accept the defendants' submission that the lease's "time is of the essence" clause assists with the interpretative issues raised in this case. The lease clauses at issue in this action did not create fixed deadlines, and the "time is of the essence" clause was not engaged.⁴ Indeed, the lease frequently recognized that the landlord could extend dates, including the Possession Date, if it was necessary to do so. This lease contained a construction contract embedded in its terms. It is not surprising that the lease also built in flexibility for those construction timelines.
- [36] In my view, the lease's meaning is neither ambiguous nor uncertain. The doctrine of *contra proferentum* is not available given the clarity of the contract terms.⁵

⁴ 3 *Gill Homes Inc. v. 5009796 Ontario Inc. (Kassar Homes)*, 2024 ONCA 6, 491 D.L.R. (4th) 499, at para. 24; *Di Millo v. 2099232 Ontario Inc.*, 2018 ONCA 1051, 430 D.L.R. (4th) 296, at para. 31.

⁵ *Consolidated-Bathurst Export Ltd.*, at p. 900; *Eli Lilly and Co.*, at para. 53; *473807 Ontario Ltd.*, at para. 63.

- [37] The best interpretation of the lease, giving effect to all of its clauses, is that the tenant has the right, pursuant to Schedule C, to insist that the landlord complete all of its work before it assumed exclusive possession of the space on the earlier of the completion of the Fixturing Period or when it opens for business. This is the same time that the tenant is obliged to commence paying rent. Until that time, the lease contemplates that the landlord and the tenant may both occupy the space to complete the landlord's work and the tenant's work, respectively. Indeed, the landlord may require the tenant to commence its work before the landlord has completed its work, provided that it is completed to a stage sufficient to permit the tenant to commence fixturing.⁶
- [38] I do not accept the defendants' argument that I can interpret the meaning of this lease by looking at another lease the landlord entered into with a different tenant. Those two leases approached the issue of the buildout of the space differently, using different provisions with different terms.

E. *The tenant breached the lease*

- [39] I find that the tenant breached the lease by failing to take possession. I find that the landlord did not breach the lease.
- [40] On November 28, 2019, the landlord notified the tenant that the Fixturing Period would begin on January 2, 2020. The lease defined this date as the Possession Date. The landlord provided more than 30 days notice of this date, as it was required to do under s. 3.01.1.
- [41] On January 20, 2020, the landlord notified the tenant that the Possession Date (meaning the beginning of the Fixturing Period) would be extended and amended to February 3, 2020. There is nothing in the lease, nor in a general notion of fairness, that required the landlord to give 30 days notice of the extended or amended Possession Date.⁷ The landlord is only required to provide 30 days' written notice the first time it provides notice to the tenant. The tenant did not take possession of the leased premises within 15 days following the commencement of the Fixturing Period on February 3, 2020. Pursuant to s. 3.01.1, this gave the landlord the right to terminate the lease on February 18, 2020.
- [42] In any event, I will take the tenant's case at its highest.⁸ The tenant concedes in the agreed statement of facts that the landlord's work was sufficiently advanced for the tenant to begin

⁶ The tenant is not entirely at the mercy of the landlord's determination of sufficient completion. Schedule C, s. 11(h) of the lease provides that any dispute shall be determined by the landlord's architect: "The opinion in writing of the Architect shall be binding on both the Landlord and the Tenant respecting all matters of dispute regarding the Landlord's Work and the Tenant's Work, including the state of completion and whether or not such work is completed in a good and workmanlike manner." The tenant did not trigger this process.

⁷ *Bennett Law Chambers Professional Corporation v. Camcentre Holdings Inc.*, 2022 ONCA 658, 164 O.R. (3d) 161.

⁸ In fact, as of February 3, 2020, none of the deficiencies and outstanding work identified by the tenant formed part of the landlord's work as described in Schedule C, which sets out all of the work the landlord was required to do. In my view, the landlord was within its rights to require the tenant to begin the fixturing work on February 3, 2020.

fixturing no later than mid-April 2020. The tenant did not take possession within 15 days of this date.

- [43] On June 5, 2020, the landlord wrote to the tenant and advised that it was in default of the lease. The landlord gave the tenant a final opportunity to remedy the defaults by taking possession of the premises by June 20, 2020, installing all required leasehold improvements and fixtures in the premises by no later than October 17, 2020, and opening for business no later than October 18, 2020.
- [44] The tenant did not take possession of the premises by June 20, 2020. On June 26, 2020, the landlord wrote to the tenant, confirmed that the tenant had refused to take possession, and accepted the tenant's "repudiation and unlawful termination" of the lease. In my view, the landlord was within its rights under the lease to do so. The tenant clearly repudiated the lease.
- [45] I do not accept the tenant's submission that the landlord repudiated the lease when it rented the premises to a new tenant in the summer of 2021. The tenant had repudiated the lease one year earlier. The landlord was mitigating its damages, not repudiating a lease.

Issue Two: Damages

- [46] The landlord has been able to rent the space to mitigate its damages. The landlord provided a spreadsheet calculating its damages after deducting the revenue generated by the new tenants. The defendant did not take issue with these calculations.
- [47] I asked the parties to calculate what the damages would be if I found that the Possession Date was April 24, 2024. The parties conferred and provided me with a spreadsheet that calculated that the tenant owed \$1,068,349.50 to the landlord as of October 8, 2024. This amount was net of revenue earned from new tenants and the amount of the deposit paid by the tenant. It included pre-judgment interest calculated pursuant to s. 7.01.1 of the lease. I understand that the parties agree that this calculation is correct.
- [48] I find that the Possession Date was April 24, 2024, and therefore, that the tenant owes damages of \$1,068,349.50 to the landlord as of October 8, 2024.

Issue Three: Liability under the indemnity

- [49] The guarantor resisted liability under the guarantee on the theory that the term of the lease never commenced, and therefore, the guarantor had no liability under his guarantee. For the reasons set out above, I do not accept this submission.
- [50] The guarantor did not make any other submissions to avoid liability under the guarantee.

[51] I find that the guarantor is liable to the landlord in the amount of \$1,068,349.50.

Costs

[52] If the parties are not able to resolve costs of this action, the plaintiff may email its costs submission of no more than three double-spaced pages to my judicial assistant on or before October 28, 2024. The defendants may deliver their responding submission of no more than three double-spaced pages on or before November 4, 2024. No reply submissions are to be delivered without leave.

Robert Centa J.

Released: October 18, 2024

CITATION: 720443 Ontario Inc. v. 2682543 Ontario Inc., 2024 ONSC 5802
COURT FILE NO.: CV-20-00645411-0000
DATE: 20241018

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

720443 Ontario Inc.

Plaintiff

– and –

2682543 Ontario Inc. and Shahab Rashid Savojbolaghi

Defendants

REASONS FOR JUDGMENT

Robert Centa J.

Released: October 18, 2024