COURT OF APPEAL FOR ONTARIO

CITATION: Canada Life Assurance Company v. Aphria Inc., 2024 ONCA 882
DATE: 20241209
DOCKET: COA-23-CV-1379

Pepall, Nordheimer and Zarnett JJ.A.

BETWEEN

The Canada Life Assurance Company,
LG Investment Management, Ltd. as trustee for IG Mackenzie Real Property Fund and OPTrust Office Inc.

Plaintiffs
(Defendants by Counterclaim/Respondents)

and

Aphria Inc.

Defendant
(Plaintiff by Counterclaim/Appellant)

Derek J. Bell and Christopher Liang, for the appellant

Gasper Galati and Wolfgang Kaufmann, for the respondents

Jeremy Opolsky, Jonathan Silver and David Bruce Bish, for the Intervener Real Property Association of Canada

Matthew Latella and Praniet Chopra, for the Intervener Better Way Alliance

Heard: November 13, 2024

On appeal from the judgment of Justice John Callaghan of the Superior Court of Justice, dated December 12, 2023, with reasons reported at 2023 ONSC 6912.

By the Court:

Introduction

[1] The main issue on this appeal is whether this court should depart from the Supreme Court's decision in *Highway Properties v. Kelly, Douglas & Co.*, [1971] S.C.R. 562 and recognize a duty to mitigate on commercial landlords who reject a repudiation of a lease by the tenant.

[2] In *Highway Properties*, Laskin J. (as he then was) described the options available to a landlord facing repudiation of a lease by its tenant at p. 570:

> The developed case law has recognized three mutually exclusive courses that a landlord may take where a tenant is in fundamental breach of the lease or has repudiated it entirely, as was the case here. He may do nothing to alter the relationship of landlord and tenant, but simply insist on performance of the terms and sue for rent or damages on the footing that the lease remains in force. Second, he may elect to terminate the lease, retaining of course the right to sue for rent accrued due, or for damages to the date of termination for previous breaches of covenant. Third, he may advise the tenant that he proposes to re-let the property on the tenant's account and enter into possession on that basis. Counsel for the appellant, in effect, suggests a fourth alternative, namely, that the landlord may elect to terminate the lease but with notice to the defaulting tenant that damages will be claimed on the footing of a present recovery of damages for losing the benefit of the lease over its unexpired term. One element of such damages would be, of course, the present value of the unpaid future rent for the unexpired period of the lease less the actual rental value of the premises for that period. [Emphasis added.]

[3] This appeal involves the underlined first option. At p. 572 of that decision, Justice Laskin specifically stated that there is no obligation on a landlord to mitigate if it kept the lease in good standing. This is the context in which the main issue on this appeal arises.

[4] A secondary issue involves the interpretation of the parties' lease.

Facts

[5] The appellant, Aphria Inc. ("the Tenant"), is a wholly owned subsidiary of Tilray, a global cannabis and consumer packaging goods company. In June 2018, the Tenant entered into a ten-year lease for commercial office premises in downtown Toronto. The building was sold in 2019 and the new landlords and successors to the lease were the respondents, Canada Life Assurance Company, LG Investment Management, Ltd. as trustee for IG Mackenzie Real Property Fund, and OPTrust Office Inc. (collectively, the "Landlord").

[6] In 2021, the Tenant served a notice of repudiation on the Landlord and vacated the premises. The Landlord responded that it was under no obligation to accept and did not accept the Tenant's repudiation of the lease. It stated that the lease remained in effect and reminded the Tenant that it was obliged to fulfill its covenants under the lease including its obligation to pay the full rent as it came due throughout the term of the lease. The Tenant answered by saying that it had vacated the premises and the Landlord had a duty to mitigate its damages. The

Landlord disagreed and persisted in treating the lease as continuing. The Tenant's real estate broker provided leads to potential tenants to the Landlord. The Landlord took no steps to re-let the premises. It reminded the Tenant of its rights to sub-let the premises under the terms of the lease. Ultimately, the Landlord sued the Tenant for rents owing since January 1, 2022.

[7] The Landlord brought a motion for summary judgment for the rent owing of $638,171.40 plus interest and for future rent as it came due. The Tenant opposed the motion on the basis that the Landlord was required to mitigate but had failed to do so. The Tenant brought a cross-motion for summary judgment for a declaration that if rent was owing, the amount was capped at rent owing for two years from the date of default pursuant to s. 19.03 of the lease.

[8] The motion judge declined to deviate from the Supreme Court's decision in *Highway Properties* and granted the Landlord summary judgment for $638,171.40 plus interest. He also declined to grant the Landlord judgment for future rent on the basis that it would be premature to do so as the Landlord would still have an obligation to account for any mitigation that might in fact take place in the future. In granting summary judgment to the Landlord, he provided a very detailed discussion of any duty of mitigation owed by a landlord when it does not accept the repudiation of a commercial lease by its tenant. The motion judge stated that it did appear anomalous that there was no such obligation.

[9] He also dismissed the Tenant's cross-motion based on s. 19.03 of the lease.

Section 19.03 states:

> If and whenever:
>
> (a) the Rent hereby reserved is not paid in full when due, and such default continues for seven (7) days after the due date;
>
> …
>
> then and in any of such events, the full amount of the current month's and the next ensuing three (3) months' installments of Rent shall immediately become due and payable and Landlord may immediately distrain for the same, together with any arrears then unpaid and at the option of Landlord, Landlord may terminate this Lease by giving notice thereof, and Landlord may re-enter the Premises and may expel all persons and remove all property from the Premises and such property may be removed and sold or disposed of by Landlord as it deems advisable or may be stored in a public warehouse or elsewhere at the cost of Tenant without Landlord being considered guilty of trespass or conversion or becoming liable for any loss or damage which may be occasioned thereby, provided, however, that such termination shall be wholly without prejudice to the right of Landlord to recover arrears of Rent and damages for any default by Tenant hereunder. Should Landlord at any time terminate this Lease by reason of any such event, then, in addition to any other remedies it may have, it may recover from Tenant all damages it may incur as a result of such termination. Notwithstanding anything in this Lease to the contrary, in no event shall Tenant be liable for (i) any consequential damages or (ii) lost Annual Rent in excess of two (2) years of Annual Rent falling due immediately following the default. If Landlord re-enters and terminates this Lease and Tenant fails to remove its property within ten (10) days after notice requiring it to do so is given, Tenant will be deemed to have abandoned its property

> and Landlord will be entitled to retain it or dispose of it for Landlord's benefit. [Emphasis added.]

[10] The motion judge considered that the two-year limitation in s. 19.03 applied only if the Landlord had terminated the lease. As the Landlord kept the lease alive after the Tenant's default, its entitlement was not capped. The motion judge found support for his interpretation in a review of the whole lease and in particular s. 19.06 (remedies cumulative), s. 20.10 (no implied surrender or waiver), and s. 12.04 (survival of obligations).

[11] The Tenant appeals from the judgment. It raises two issues. it submits that the motion judge erred: (i) in failing to recognize a duty to mitigate on the Landlord and, (ii) in his interpretation of s. 19.03 of the lease.

[12] On April 2, 2024, Fairburn A.C.J.O refused the Tenant's request that a five-judge panel hear this appeal. On October 10, 2024, Fairburn A.C.J.O. granted both Better Way Alliance ("BWA") and Real Property Association of Canada ("RPAC") intervener status. The former supports the recognition of a duty to mitigate and the latter does not.

Positions of the Parties and Interveners on the Duty to Mitigate

[13] A brief outline of the positions of the parties and interveners is as follows.

a) The Tenant

[14] The Tenant submits that the law should recognize a duty to mitigate on commercial landlords. The comments of Justice Laskin on this issue in *Highway Properties* were *obiter* in nature as were those in this court's decisions in *Almad Investments Ltd. v. Mister Leonard Holdings Ltd.*, 1996 CanLII 412 (Ont. C.A.) and *TNG Acquisition Inc. (Re)*, 2011 ONCA 535, 107 O.R. (3d) 304, both of which purported to follow *Highway Properties*. Mitigation is a doctrine based on fairness and common sense. Such a duty exists in the context of residential and equipment leases and in other jurisdictions such as Quebec and many of the states in the United States.

[15] Furthermore, the Supreme Court's recognition of good faith as an organizing principle of contract law, the doctrine of efficient breach, and the development of real estate law such as that relating to specific performance are all consistent with the recognition of a duty to mitigate on a commercial landlord.

b) The Landlord

[16] In contrast, the Landlord submits that the established law should not be changed. It has been followed by appellate courts in both Ontario and British Columbia. The proposed change is fundamental and not incremental and would have complex and far-reaching effects. Moreover, the Tenant's position would shift the burden of default onto the innocent party in circumstances where the tenant

has the option of subletting the premises. Neither the duty of good faith nor the doctrine of efficient breach affords a basis for change. In addition, imposing a duty to mitigate would come at the expense of the property and possessory rights inherent in a commercial lease and would dilute the value of a commercial tenant's interest from a lease to a license.

c) BWA

[17] BWA submits that *Highway Properties* does not free landlords from the ubiquitous contractual duty to mitigate. The "contractualization" of commercial leases espoused by *Highway Properties* has been reinforced by subsequent cases including this court's decision in *Canadian Medical Laboratories Ltd. v. Stabile* (1997), 98 O.A.C. 3. The respondent's position would lead to commercially unreasonable outcomes and sanction landlords' abuse of power and bad faith conduct.

d) RPAC

[18] RPAC takes the position that *Highway Properties* is binding and that *stare decisis* is particularly important in commercial and property law because it protects people's ability to "trade and arrange their affairs with confidence": *R. v. Kirkpatrick*, 2022 SCC 33, 471 D.L.R. (4th) 440, at para. 184, *per* Côté, Brown and Rowe JJ. The proposed duty to mitigate would destabilize the law by undermining the real property nature of leases.

[19] RPAC submits that legislatures are better equipped than courts to assess complex changes to the common law, consider policy, and craft exceptions and transition provisions.

Analysis

[20] For the following reasons, we conclude that the motion judge did not err in determining that he was bound to follow *Highway Properties* and that therefore the Landlord did not have a duty to mitigate in this case.

[21] The motion judge observed at para. 1 of his reasons that the Tenant invited him "to disregard a principle arising from a Supreme Court of Canada case which has been applied by the Ontario Court of Appeal and trial courts in Ontario for 50 years." As a result of the application of the doctrine of *stare decisis*, he determined that he was bound by: (i) the Supreme Court's decision in *Highway Properties*; and (ii) two Court of Appeal decisions applying *Highway Properties: Almad Investments* and *TNG Acquisition*.

[22] The motion judge acknowledged that as *Highway Properties* did not involve the first scenario described by Justice Laskin, the *dicta* on the first scenario was *obiter*. The landlord had taken control of the premises and mitigation had occurred. However, applying the principles in *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, the motion judge reasoned that the statements in *Highway Properties* were authoritative and binding and not simply persuasive in nature. In our view, this

analysis is unassailable. Justice Laskin clearly turned his full attention to the issue of repudiation of a lease and mitigation and dealt with it definitively.

[23] Moreover, this court has treated *Highway Properties* as such. In *Almad Investments*, this court stated:

> In this case, the respondent landlord elected to do nothing to alter the relationship of landlord and tenant but simply insisted on performance of the terms of the lease and sued for rent on the footing that the lease remains in force. In these circumstances, the decision of the Supreme Court of Canada in *Highway Properties Limited v. Kelly Douglas & Co.* (1971), 17 D.L.R. (3d) 710 confirms that the landlord has no duty to mitigate. Although the question of a duty on the landlord to mitigate has been the subject of comment, *Highway Properties* has not been overruled on this point. As the respondent pointed out, the appellant is still entitled to look for a new tenant and sublet the space.

[24] The decision of *TNG Acquisition* also applied the *dicta* reflected in the first scenario of *Highway Properties*. There, citing *Highway Properties*, Gillese J.A. described the courses of action a landlord could take when a tenant repudiated the lease. She wrote at para. 40:

> The case law makes it clear that the landlord has an election to make when a tenant repudiates. The landlord must make the election in order for the parties to know what consequences flow from the repudiation. If the landlord does nothing, the landlord/tenant relationship remains and the lease continues in force: *Highway Properties*, at p. 570.

[25] In a similar vein, while the Tenant argues that the *dicta* from these two Ontario Court of Appeal cases are *obiter*, they are nonetheless clearly authoritative.

[26] The Intervener, BWA, directed the panel to this court's decision in *Canadian Medical Laboratories*, a case that was not brought to the attention of the motion judge and which BWA submits supports its position.

[27] We do not accept that this case stands for the proposition advanced by BWA. Its facts did not fall within the first scenario described in *Highway Properties* which is in issue on this appeal. It involved an offer to lease where at trial the tenant took the position that it was void due to misrepresentation and mistake. The court rejected that argument and treated the lease as having been repudiated and the landlord as having accepted the repudiation when it leased the premises to a third party. We also note that *Canadian Medical Laboratories* pre-dated *TNG Acquisition*.

[28] Nor are we persuaded by the appellant's other arguments that would avoid the application of *stare decisis*. A duty of mitigation for residential leases is recognized by the provisions of the *Residential Tenancies Act, 2006*, S.O. 2006, c.17. The appellant submits that a duty of mitigation exists with equipment leases and relies on the Supreme Court's decision of *Keneric Tractor Sales Ltd. v. Langille*, [1987] 2 S.C.R. 440 in that regard. That case concerned a lessor who

repossessed equipment following default by the lessee. Following *Highway Properties*, the Supreme Court held that damages from a breach of a chattel lease should, like a land lease, follow a breach of contract analysis. However, the facts of that case are more analogous with scenario four in *Highway Properties* and, as the motion judge in the case under appeal noted, Justice Laskin's statement on scenario one and mitigation in *Highway Properties* was not subject to direct comment in *Keneric*. Lastly, good faith, efficient breach and the evolution of real estate law do not serve to displace *stare decisis*.

[29] We also note that the British Columbia Court of Appeal in *Anthem Crestpoint Tillicum Holdings Ltd. v. Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI*, 2022 BCCA 166, 92 B.C.L.R. (6th) 298 decided that it was bound by the dictates of *Highway Properties*.

[30] In our view, there is no compelling basis on which to interfere with the motion judge's conclusion on the issue of *stare decisis*. He was bound by authoritative jurisprudence to hold that where a landlord refuses to accept a tenant's repudiation of a commercial lease and insists on performance, there is no duty on the landlord to mitigate. The motion judge correctly decided that rejection of the principle in *Highway Properties* would create uncertainty and instability in a manner contrary to the doctrine of *stare decisis*.

[31] In conclusion, it is not for this court to change this law but for the Supreme Court or the Legislature to do so. We note that the law on mitigation in Quebec is found in the *Civil Code* and that at least some of the American authority is based on statutory changes. In that regard, it would be open to the Ontario Legislature to amend the *Commercial Tenancies Act,* R.S.O. 1990, c. L.7 to provide for mitigation as it did with the *Residential Tenancies Act, 2006*, S.O. 2006, c.17.

Positions of the Parties on Interpretation of Lease

[32] Turning to the second ground of appeal, again, a brief outline of the parties' position is as follows.

a) Tenant

[33] The Tenant submits that the applicable standard of review is correctness and that the motion judge erred in his interpretation of s. 19.03 of the lease. He ought to have interpreted the lease as capping damages at two years of rent. He erroneously interpreted the lease as not limiting damages in circumstances where, as here, the lease had not been terminated.

b) Landlord

[34] The Landlord submits that the applicable standard of review is not correctness but palpable and overriding error and the motion judge's analysis discloses no such error. He carefully assessed the text of s. 19.03 and placed it

within the context of the remainder of the lease. He also properly considered whether the Tenant's interpretation would make commercial sense.

Analysis

[35] In considering this second issue, the first question to address is the applicable standard of review. In *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, 373 D.L.R. (4th) 393, the Supreme Court charted a new approach to the applicable standard of review for contractual interpretation. The Court emphasized that approach recently in *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.*, 2024 SCC 20, 492 D.L.R. (4th) 389, stating at para. 27: "This Court's jurisprudence firmly establishes that questions of contractual interpretation, which involve questions of mixed fact and law, are ordinarily afforded deference on appellate review." An exception exists for extricable questions of law, however, a search for an extricable question of law is inconsistent with *Sattva*'s holding that such questions will be "rare" and "uncommon". Courts are to be cautious in identifying such questions because ascertaining the objective intention of the parties is an "inherently fact specific" exercise: para. 28. Even with standard form contracts, which based on *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, are an exception to *Sattva*, the *Sattva* approach may still apply where meaningful evidence of the factual matrix exists and there is a contract of

"utter particularity" due to the unique set of circumstances: *Ledcor*, at paras. 42 and 48.

[36] This was not a standard from contract. Rather, as found by the motion judge, it was "an arms-length commercial lease negotiated by two sophisticated parties". Moreover, the Tenant did not point to any extricable error of law nor do we see one. The motion judge properly instructed himself on the applicable legal principles. His interpretation of the lease should be reviewed for palpable and overriding error.

[37] The motion judge considered the whole contract and the plain wording of s. 19.03. He considered that the latter had to be read in context. He reasoned that the "notwithstanding" sentence was in the context of the landlord terminating the lease for default. As there was no termination, the provision did not apply. Furthermore, he reasoned that this interpretation was also supported by ss. 12.04, 19.06, and 20.10 of the lease. He determined that it would not make commercial sense for the lease to limit the Landlord's remedies without expressly saying so. We see no palpable and overriding error.

Disposition

[38] For these reasons, the appeal is dismissed. If they are unable to agree, the parties are to make brief written submissions on costs not to exceed three pages in length. There will not be any order of costs for or against the interveners.

Released: December 9, 2024 “S.E.P.”

“S.E. Pepall J.A.”
“I.V.B. Nordheimer J.A.”
“B. Zarnett J.A.”