IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Four Top Hospitality Group Ltd. v. Olde Towne Developments Ltd.,* 2024 BCSC 2279

Date: 20241213
Docket: S184816
Registry: Victoria

Between:

Four Top Hospitality Group Ltd., Rajiv Khaneja, and Christopher Sparling

Plaintiffs

And

Olde Towne Developments Ltd., Aaron Usatch

Defendants/Plaintiffs by Counterclaim

And

Four Top Hospitality Group Ltd.

Defendant by Counterclaim

Before: The Honourable Madam Justice Tucker

Reasons for Judgment

Counsel for the Plaintiffs and the Defendant by Counterclaim Four Top Hospitality Group Ltd.:	P. Harrison
Counsel for the Defendants/Plaintiffs by Counterclaim:	H.M.E. Sevenoaks
Place and Dates of Trial:	Victoria, B.C. August 15-18, 21-25, 28-30, 2023 February 20-23, 26-29 and March 1, 2024
Place and Date of Judgment:	Victoria, B.C. December 13, 2024

Table of Contents

I. INTRODUCTION

[1] Olde Towne Developments Ltd. ("Olde Towne") is a BC corporation, a building owner and a landlord. Aaron Usatch is the owner and director of Olde Towne. CRAM Food Group Ltd. (“CRAM") is a BC corporation. In 2021, CRAM changed its name to Four Top Hospitality Group Ltd. (“Four Top”). Rajiv Khaneja and Christopher Sparling were owners and directors of CRAM from its inception and are now owners and directors of Four Top.

[2] In 2015, CRAM rented a commercial space in Victoria from Olde Towne (the “Lease”). On June 27, 2018, Olde Towne terminated the Lease with alleged cause. The termination of the Lease gives rise to this proceeding.

[3] CRAM claims that Olde Towne breached the Lease by terminating it unlawfully. Alternatively, CRAM claims that Olde Town induced a breach of contract CRAM was party to and/or committed the unlawful means tort against CRAM. Mr. Khaneja and Mr. Sparling also seek damages for defamation based on allegations that Mr. Usatch and/or Olde Towne slandered them in a conversation between Mr. Usatch and a CRAM employee. The defendants deny all of the claims against them.

[4] Olde Towne makes a counterclaim against CRAM, alleging that CRAM, having been given lawful notice, was in default of the Lease at the time of termination.

II. THE CAST

[5] As the facts are rather complicated, I will start by identifying the parties, witnesses and other characters that arise in the narrative.

Olde Towne

[6] Olde Towne owns two buildings on Yates Street in downtown Victoria. Mr. Usatch acquired Olde Towne from his mother. The buildings owned by Olde Towne have been held by Mr. Usatch’s family for three generations.

Aaron Usatch

[7] In addition to being the owner and director of Olde Towne, Mr. Usatch works as a property manager.

CRAM

[8] CRAM was incorporated in 2015. Following incorporation, Mr. Khaneja and Andrew Wilkinson, through holding companies, held a combined 95% interest in CRAM, while Mr. Sparling held the remaining 5%. In 2019, CRAM amalgamated with Ottavio Italian Bakery & Delicatessen Ltd. ("Ottavio"). On October 22, 2021, Ottavio changed its name to Four Top. As most of the events material to the litigation took place between 2015 and 2018, I will generally refer to the corporate plaintiff as CRAM, and only as Four Top as may be required by context.

Rajiv Khaneja

[9] Mr. Khaneja is an entrepreneur and investor, with a significant focus on Victoria. He was the person primarily responsible for the negotiation of the Lease on behalf of CRAM.

Christopher Sparling

[10] Mr. Sparling is a businessman and an investor. At the time of trial, he was the Chief Executive Officer of Tiny Capital Inc. ("Tiny Capital"). Tiny Capital is a public company that acquires and invests in small companies.

Andrew Wilkinson

[11] Mr. Wilkinson is also a businessman and an investor. Mr. Wilkinson, like Mr. Sparling, is also involved in running Tiny Capital.

Joanna Danzinger

[12] Ms. Danzinger operates a personal assistant services business. Ms. Danzinger began performing services for CRAM's benefit starting in February 2018, and as directed by Mr. Sparling, Mr. Khaneja, Mr. Wilkinson and other CRAM

representatives. Prior to starting her own company, Ms. Danzinger was employed in senior positions in the hospitality industry.

Lindsay Weir

[13] Ms. Weir is a co-worker of a friend of Ms. Danzinger. Ms. Danzinger hired Ms. Weir to act as CRAM's representative during an inspection of the leased premises by Olde Towne on June 26, 2018.

Julia Dilan

[14] Ms. Danzinger arranged for Ms. Dilan, a friend of hers from the hospitality industry, to work as a temporary employee for CRAM in June 2018.

Ericke Caulder

[15] Ms. Danzinger arranged for Mr. Caulder, an acquaintance of hers from the hospitality industry, to work as a temporary employee for CRAM in June 2018.

Tiverton

[16] Tiverton Holdings Ltd. ("Tiverton") is a business in the restaurant industry. Tiverton operates a number of Victoria restaurants, some of which have been in operation for decades, and three of which are located in spaces leased from Olde Towne.

[17] Prior to August 2019, Tiverton had four owners: Dave Craggs, Tom Ferris, and two of Mr. Ferris' relatives. Until Mr. Ferris' death in August 2019, Tiverton was managed and operated by Mr. Ferris and Mr. Craggs. Since August 2019, Tiverton has been managed and operated by Mr. Craggs. In 2021, Four Top bought a significant interest in Tiverton. The evidence is unclear as to whether that interest is held directly or indirectly.

[18] Tiverton is the other party to the alleged contract that founds CRAM's allegation of inducing breach of contract. Tiverton is also the third party relating to CRAM's unlawful means tort claim. CRAM alleges it would have undertaken a project with Tiverton in June 2018 but for Olde Towne's interference.

David Craggs

[19] Mr. Craggs has been an owner of Tiverton since about 2000. In 2015, Mr. Craggs was both Tiverton's executive chef and operations manager. He continued in both of those capacities for Tiverton as of the date of trial. From 2021 through to trial, Mr. Craggs has also been the chief executive officer for Four Top.

III. OUTLINE OF REASONS

[20] This case involves a considerable number of uncontentious facts, interspersed with highly contentious evidence. In the narrative below, where statements of fact are made without any elaboration, they represent my findings as made on evidence that was either undisputed or not seriously disputed. The latter category includes matters on which various witnesses gave at least some inconsistent evidence, but where the differences were not material to the finding and/or where the inconsistency in the evidence was not treated as material by the parties in their closing arguments. When contentious points arise, I will review the disputed evidence. Some of the contentious matters will be resolved following my review of the evidence, but others will be left for resolution in the course of addressing issues.

[21] I will provide a summary outline of the parties' positions. Following that, I will make some general findings with respect to the credibility and reliability of the various witnesses. I will then address a number of discrete evidentiary issues requiring determination.

[22] Finally, I will address the governing law and principles and then apply those on an issue-by-issue approach, making additional relevant factual findings as required in the process.

IV. BACKGROUND AND EVIDENCE

A. CRAM and the Premises

[23] CRAM was put together as an investment vehicle to open and operate a restaurant. CRAM was formed with a specific concept in mind: a "Brooklyn-style"

pizzeria offering a variety of craft beer along with other drinks. Initially, a fourth person, Matthew Quinn (the "M" in CRAM), was to be involved in the project. It was anticipated that Mr. Quinn would be responsible for the day-to-day operation of the restaurant. Mr. Quinn dropped out of the project very early on, after which CRAM's business plan included employing a restaurant manager.

[24] Olde Towne owns a building located at 538 Yates Street in Victoria ("538"). 538 was originally a two-story commercial building with a brick exterior and a painted wood and glass storefront at street level. In 2015, Olde Towne completed a renovation converting 538 to a four-story, mixed-use commercial and residential building, but retaining the original heritage exterior. Post-renovation, most of the ground floor and the front half of the second floor were commercial spaces. The back of the second floor and the higher floors were residential units. Mr. Usatch and his spouse reside in one of the residential units.

[25] The building next door, 536 Yates Street ("536"), is also owned by Olde Towne. 536 is a two-story building of similar age and style as 538.

[26] 536 is leased to Tiverton and has been for some 30 years. Tiverton operates two restaurants in 536: the upper floor houses Ferris' Oyster Bar, which is a fine dining restaurant serving dinner. On the street level, Ferris' Grill & Garden Patio offers casual dining from lunch through dinner. Mr. Craggs testified that in 2018, 536 had last been fixed up by Olde Towne about 15 years or so ago and had weather damage resulting in missing putty and areas where it was starting to rot out a bit in the windows.

[27] Following the 538 renovation, Tiverton opened another restaurant, Perro Negro, in the second-floor commercial space in 538. Perro Negro is a wine and tapas bar. It is open to the public for limited hours on most weekends, but also operates as a private event space. Ferris' Oyster Bar, Ferris' Grill & Garden Patio and Perro Negro each have an independent kitchen, although some shared kitchen prep work is done for all three. Tiverton uses a combined group of employees to staff all three.

[28] The premises under the Lease occupy about three-quarters of 538's street level floor (the "Premises"). As viewed from Yates Street, 538 has an asymmetrical front. The far-left quarter is an entryway to a hall (the "Residential Entrance") that provides access to the residential units. The remaining three-quarters of the street front is the front of the Premises. The Premises run the full depth of 538, making it a long and narrow space.

[29] There is a back hallway between the Premises and 536 (the "Back Hallway"). The Back Hallway is accessible from both 536 and the Premises, and leads to an exit door. The Premises include a back patio (the "Back Patio"). The Back Patio takes up about a third of the width of the Premises' rear wall.

[30] There is an open space running behind the rear of 536 and 538. It was referred to as a "walkway". It is akin to an alley, but it is closed off by buildings at one end and is not open to vehicle traffic.

[31] The Premises' interior was left unfinished in the renovation. The space was put up for rent as an empty shell: the floor was concrete, the ceiling was unenclosed, and there were no interior walls, electrical wiring or plumbing.

[32] Mr. Khaneja and Mr. Wilkinson thought the Premises would work well for the Brooklyn-style pizzeria concept. An offer to lease (the "Offer to Lease") dated May 20, 2015, was sent to Olde Towne through a real estate agent. The Offer to Lease proposed a five-year term and two five-year renewals, and $5500 monthly rent for the original term. Although Mr. Khaneja and Mr. Wilkinson were already looking for a space when Mr. Sparling joined them in the venture, Mr. Sparling had joined by the time of the lease negotiations following the Offer to Lease.

[33] On June 3, 2015, Mr. Usatch sent the real estate agent back a proposed lease and a proposed addendum (collectively, the "June 3 Proposal"). On June 22, 2015, the Lease between Olde Towne and CRAM was signed. The Lease is undated, but the addendum (the "Addendum") indicates it was signed on June 22,

2015. The evidence satisfies me that the Lease and Addendum were both signed on that same date.

[34] Mr. Khaneja testified that he had primary responsibility for the Lease negotiations on behalf of CRAM. Mr. Sparling testified that he was personally involved in the Lease negotiations. Mr. Usatch testified that it appeared to him that all of the "CRAM people" were directly involved in negotiations at times.

[35] Mr. Usatch testified that the Lease negotiations were extensive, involved a lot of back and forth, and that they may have taken as long as four months. Notwithstanding that testimony, there is no documentary evidence as to negotiations leading up to the Lease aside from the Offer to Lease and the June 3 Proposal. Further, the Offer to Lease and the signing of the Lease were just over one month apart. I am satisfied that Mr. Usatch's claim that there were extensive negotiations over the Lease terms is incorrect.

B. The Lease

[36] The Lease is for an original 5-year term (September 1, 2015 to August 31, 2020), with two renewal terms of 5 years each. The Lease provides for rent of $7,500 per month for the original term, for rent in the renewal terms to be no less than it was in the preceding term, and for the rent on the first renewal to be no greater than $8,300 per month. There is no rent maximum for the second renewal term.

[37] The Addendum states that notwithstanding the Lease terms, there will be a rent reduction of $2,000 per month, which "reflects the Tenant's anticipated Tenant Improvements", resulting in a payable rent of $5,500 (plus GST) per month. The Addendum also modifies the Lease terms with respect to rent under renewals:

> a. for the First Renewal Term, Rent shall be not less the $5,500.00 but not more than $6,300.00 (Six thousand three hundred) plus GST per month; and
>
> b. For the Second Renewal Term, Rent shall be not less than $6,300.00 (Six thousand three hundred) plus GST per month.

[38] The following Lease provisions feature in the present dispute:

> **3. TENANT'S BUSINESS**
>
> 3.1 Business. The Tenant will conduct or cause to be conducted on the Premises the business of a food primary licensed restaurant or lounge or food primary licensed bar and no other business without the express written consent of the Landlord, such consent not to be unreasonably withheld. The Tenant will conduct its business on the Premises during normal business hours for like businesses in the community.
>
> …
>
> **4. TENANT'S COVENANTS**
>
> 4.1 Assignment or Subletting. The Tenant will not assign this Lease nor sublet the Premises or any part of the Premises without the consent in writing of the Landlord, such consent not to be unreasonably withheld. The Tenant agrees that any consent to an assignment or subletting of the Lease or the Premises will not thereby release the Tenant of his obligations hereunder.
>
> 4.2 To Repair. The Tenant will keep the Premises, including fixtures, in good and substantial repair. The Landlord may at all reasonable times during the Term enter the Premises to examine their condition and the Tenant will well and sufficiently repair any reasonable defect found by the Landlord within ten (10) business days of a notice so to do. The Tenant's obligation under this paragraph includes the duty to maintain the interior decoration of the Premises in a reasonable state of repair, to repaint, repaper or refinish all wall surfaces within the Premises and to maintain the patio on the Land at the rear of the Building in a neat and tidy condition as may be reasonably required by the Landlord.
>
> 4.3 Repair of Exterior of Building. Having regard to the Landlord's obligations under section 5.2 of this Lease, the Tenant will have the obligation to maintain the exterior of the Building up to height of the commencement of the second floor, including general maintenance such as cleaning the windows and ensuring paint is in good condition, at its own cost.
>
> 4.4 Alterations. The Tenant will not make any alterations in the structure, plan or partitioning of the Building nor install any plumbing, piping, wiring, heating or cooling apparatus without the written consent of the Landlord, such consent not to be unreasonably withheld; PROVIDED THAT the Tenant will indemnify and save harmless the Landlord from all claims for liens, wages or materials or for damage to persons or property caused during the making of or in connection with any repairs, alterations, installations and additions made or caused to be made by the Tenant; PROVIDED FURTHER that if any builders' or other liens are filed against the Landlord's title to the Land in respect of any repairs, alterations, installations or additions made by or on behalf of the Tenant, the Tenant within five (5) days after notice of the filing thereof will cause the same to be discharged from the Landlord's title.
>
> …

> **6. MUTUAL COVENANTS**
>
> ...
>
> 6.4 Fixtures. At the expiration of the Term, the ownership of all structures and improvements erected or placed upon the Premises and all fixtures in or about the Premises will vest in the Landlord and no compensation will be payable to the Tenant by the Landlord for the same; PROVIDED NEVERTHELESS that trade fixtures, with the sole exception of the bar, placed in the Premises by the Tenant may be removed by the Tenant during the term hereby created upon the condition that the Tenant give to the Landlord ten (10) days' advance notice specifying the fixtures to be removed; AND PROVIDED FURTHER that the Tenant will make good any and all damages to the Premises caused by such removal.
>
> …
>
> **7. LANDLORD'S REMEDIES**
>
> ...
>
> 7.2 Tenant's Default. If at any time:
>
> … or
>
> (b) the Tenant fails to perform or observe any other covenant or term of this Lease and such default shall continue for fifteen (15) days after notice thereof has been given by the Landlord to the Tenant; or
>
> (c) the Premises are vacated by the Tenant or are occupied by any person or persons other than the Tenant without the consent of the Landlord
>
> then in any such case:
>
> … or
>
> (f) further alternatively, the Landlord may elect to terminate this Lease and retake possession of the Premises with notice to the 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.

[39] Schedule B of the Lease sets out a list of work that Olde Towne agreed to have completed by the commencement of the Lease. It includes the construction of washrooms.

C. Famous Original

[40] After entering the Lease, CRAM undertook substantial renovations ("the Conversion") to convert the Premises into a restaurant. The Conversion included constructing a bar, a kitchen, seating, lighting and interior walls, as well as equipping the kitchen and interior decorating. Mr. Khaneja testified that the "Brooklyn-style"

interior included placing some graffiti stickers (“tags”) on the pendant lamps and including designated space for graffiti on the washroom walls. The inside area at the rear of the Premises (i.e., near the Back Patio) was made into an arcade area with some vintage-looking games.

[41] Mr. Khaneja testified that CRAM paid out approximately $345,000 to professionals, contractors and suppliers for the Conversion work.

[42] In mid-January, 2016, CRAM forwarded an invoice from its general contractor, Sculpin, to Olde Towne for payment directly to Sculpin under Schedule B to the Lease. Olde Towne denied it had any obligation to pay directly. Sculpin went unpaid while CRAM and Olde Towne disputed how Schedule B was intended to operate. Sculpin, relying on its contract with CRAM, filed a builder’s lien against 538 for about $24,000. Mr. Khaneja testified that ultimately CRAM paid Sculpin directly as they needed to open.

[43] Mr. Khaneja testified that the restaurant opened as “Famous Original” at some point in February 2016.

[44] Mr. Khaneja testified that at some point in 2016, CRAM and Olde Towne had a dispute about who was responsible for the water bill, with the water bill dispute ultimately being resolved in mediation.

[45] A wide pedestrian walkway with paving stones runs in front of 536 and 538. At some point, the municipality granted permission for CRAM and Tiverton to put outdoor patios between the sidewalk and the building fronts of 536 and 538. CRAM had a wooden slat fence built to demarcate its patio (the “Front Patio”) from the sidewalk. It also had some wooden bench seating and flower boxes built. The benches/ flower boxes, in conjunction with tables and chairs, provided seating for the Front Patio. Ferris’ Grill & Garden Patio put a fairly similar patio in front of 536.

[46] On August 13, 2016, Mr. Craggs emailed CRAM asking if it would consider subletting the arcade space to Tiverton to use for storage. Mr. Khaneja replied that CRAM wanted to use the space. On August 17, 2016, Mr. Craggs emailed again,

noting that the Front Patio was now operating, and asking if Tiverton could sublet the Back Patio for storage. Mr. Khaneja replied that CRAM wanted to use the Back Patio.

[47] 536 is a shorter building than 538. In addition to the patio out front, Ferris' Grill & Garden Patio had a small ground level patio at the immediate rear. A fence separated Ferris' Grill & Garden Patio's back patio from the space where Tiverton kept its garbage and recycling bins and some other items at the back of 538.

[48] Mr. Khaneja testified that around the summer of 2017, CRAM attached two outdoor speakers ("Outdoor Speakers") to the wood above the glass on the exterior front of the Premises. They were positioned to play music out over the Front Patio seating areas. The Outdoor Speakers are black and about 12-16 inches by about 8-10 inches. There is one above the centre of each front window. The left-side speaker is no more than four or five feet to the side of the Residential Entrance. The Outdoor Speakers are readily apparent and identifiable as speakers in photographs of the Premises. Mr. Sparling testified that at the time the Outdoor Speakers went up, he had assumed they were included in plans that Olde Towne had already approved.

[49] On January 2, 2018, Mr. Usatch sent an email to Mr. Khaneja and Mr. Wilkinson saying that Olde Towne had hired a janitor and given the Front Patio a clean-up, including the removal of grass between the paving stones. Mr. Usatch said that the Front Patio and sidewalk would be power-washed in the spring, and commented that that would be a good time to repaint deteriorated spots on the Premises' exterior. He asked if CRAM was interested in having a quote from Olde Towne's painting contractor for the work. Mr. Wilkinson replied that he thought CRAM was "good on the painting front for now". Mr. Usatch replied that Olde Towne had cleaned the Front Patio "as a courtesy", and reminded them that CRAM was responsible for maintaining the outside of the Premises under the Lease.

[50] There is a contractor's invoice in evidence for painting work performed at Famous Original in February 2018. It refers to an "original contract" for $1770, and to an additional charge for "painting of lower walls along the bar and large hanging light

valances" for an additional $560. Neither Ms. Danzinger (who had arranged for the painter to attend) nor Mr. Khaneja could say for certain whether the work done included exterior touch ups.

[51] On March 19, 2018, Mr. Usatch forwarded CRAM a $250 quote for exterior painting on the Premises from Olde Towne's painting contractor. Mr. Usatch noted that "the wood is exposed in many areas and needs to be maintained." Mr. Khaneja replied that CRAM would "do an assessment of any maintenance issues and make appropriate repairs". Mr. Khaneja testified that he and Mr. Wilkinson were both of the view that the exterior paint was in satisfactory condition at that time.

[52] Famous Original did not take off as CRAM had hoped.

[53] In February of 2018, CRAM changed the layout of the Premises somewhat, buying some additional light fixtures and providing some additional seating.

[54] Mr. Khaneja testified that after it opened, Famous Original's hours were generally noon to midnight on Monday-Thursday, noon to 1:00 AM on Friday and Saturday, and closed on Sundays. However, he testified that Famous Original had also experimented with changing its operating hours from time-to-time, such as trying 4:00 PM to 10 PM for a time.

D. Demise of the Pizzeria Concept

[55] Come spring of 2018, CRAM had been through several restaurant managers and had yet to turn a profit. CRAM realized changes would be needed in order to become profitable. Mr. Khaneja testified that CRAM's goal was still to get the right people and concept to operate a successful restaurant/lounge on the Premises, but that CRAM also had a "Plan B", which was to sublease the Premises as a turn-key operation to at least recapture CRAM's investment in the Conversion.

[56] In assessing future plans, CRAM had discussions with Mr. Ferris and Mr. Craggs, both because Tiverton had expressed interest in subleasing in the past and because they were successful restaurant operators. Mr. Craggs confirmed that

discussions around CRAM and Tiverton both using parts of the Premises or operating something together in the Premises began in the spring of 2018.

[57] Following up on those earlier discussions, on May 23, 2018, Mr. Craggs emailed Mr. Wilkinson a number of options for consideration. Mr. Craggs wrote:

> Hi Andrew,
>
> In discussion with my partner Tom, we have identified four possible scenarios that would be of interest to us, and possibly you. For Clarity, our greatest interest is to gain storage, and potentially increase seating. With that in mind
>
> OPTION 1
>
> Subleasing the rear arcade portion of the space and the Patio. For this we would be prepared to pay a sublease to you, and in addition, take care of and pay for your garbage and waste. Dividing walls would of course be supplied by us and could include frosted glass in the upper wall to maintain some light.
>
> OPTION 2
>
> Same as option 1, however as part of the renumeration, we would engage in some form of management consultancy for you to ensure smooth running and growth of your existing (or an evolved) business at Famous Original. This would involve what we are best at, profitability in the food service sector.
>
> OPTION 3
>
> The Purchase of your lease and business. I am aware however, that the value to us and the value to you might be very far apart
>
> OPTION 4
>
> Some form of collaboration on a new project in the space that is of interest to both parties. A project that would still address some of our needs, while creating a new profitable venture. To be clear, I do not have a concept in mind at the moment.

[58] The next day, May 24, 2018, Mr. Wilkinson sent a reply email as follows, copying all the other principals:

> Hey Dave,
>
> Looping in my business partners, Rajiv and Chris. We've decided to shut down the restaurant, so option 2 is out.
>
> What is your preferred option? Well likely be sub-letting the space to somebody new for what we'd assume will be a new business, but we'd be open to exploring you guys renting the arcade + patio, an outright purchase, or collaboration.

[59] On May 26, 2018, Mr. Craggs wrote expressing an interest in Tiverton simply taking over the Lease. On May 28, 2018, Mr. Wilkinson wrote asking Tiverton to send an offer. On May 29, 2018, Mr. Craggs emailed a response:

> Well I'm afraid that our best foot forward is not terribly exciting.
>
> As we were thinking more that you would be in operation through the summer, we were not really prepared to take on a new project as we head into our own busy summer. Incurring the cost of having the space empty for 4-6 months definitely eats into what we are willing to offer.
>
> To that, I'm afraid we are only prepared to offer $10,000 to take over the lease.

[60] Mr. Usatch testified that in May 2018, he noticed that Famous Original's hours seemed to be changing and then that the restaurant had been "closed for a number of days", he contacted CRAM to see what was happening. In the email he sent to CRAM, dated June 6, 2018, Mr. Usatch asserted that the restaurant had been closed for two weeks.

[61] I am satisfied that Famous Original closed very shortly after Mr. Wilkinson's May 24 email advising Mr. Craggs that the decision had been made. There was no reason to delay. I find that Famous Original ceased being open to the public as a pizzeria on or about May 26, 2018 (the "Closure"), which loosely aligns with the timeframe suggested in Mr. Usatch's June 6 email.

[62] Mr. Usatch testified that on or about May 30, 2018, Mr. Khaneja told him that the business was going to close and CRAM was looking at its options, including "just selling it". On May 30, 2018, Mr. Usatch texted Mr. Wilkinson that he understood the business was for sale, to which Mr. Wilkinson texted back "not necessarily" and said that CRAM was looking at a number of options. Not long after this text exchange, Mr. Usatch had a coffee meeting with Mr. Khaneja and Mr. Wilkinson at a café. Mr. Usatch offered at the meeting to let CRAM "walk away" from its responsibilities under the Lease. CRAM did not take up the offer.

[63] At some point in June 2018, Mr. Khaneja and Mr. Sparling drafted some template language for a CRAM sublease for the Premises. The undated draft

sublease is in evidence. Mr. Khaneja testified that he and Mr. Sparling both knew others in the restaurant industry and had some ideas for a few potential subtenants.

[64] Within two weeks or so after the Closure, CRAM had paper put up on the front windows and Ms. Danzinger was asked to, and did, order a poster reading "under renovation" and "something new coming soon" to be put in the window.

E. Allegations of Breach of the Lease

[65] As noted, on June 6, 2018, Mr. Usatch emailed CRAM stating the restaurant had now been closed for over two weeks. He also stated:

> This is quite concerning to us as landlord as well as a security risk to the building. It is also a breach of your contract for failing to operate a business.
>
> We need to have a clear understanding of what your intentions are for the business going forward.
>
> [emphasis added.]

[66] Mr. Usatch also asked for access to the Premises to check on its condition.

[67] On June 8, 2018, Ms. Danzinger took a set of 19 photographs (the "June 8 Photos") of the Premises. The June 8 Photos are of very good quality and show details clearly. The June 8 Photos show numerous angles of the front exterior, including the Front Patio, as well as some interior areas. Notably, Ms. Danzinger took the June 8 Photos after Mr. Usatch sought access, but prior to any allegation of default regarding repair or maintenance.

[68] On June 9, 2018, Mr. Usatch emailed CRAM again, saying it had come to his attention "that you are unlawfully removing and selling fixtures from the premises without agreement or notice to the landlord". Mr. Usatch testified, in respect to that allegation, that as he was walking home one evening, he saw people coming out of the Premises carrying "various articles, light fixtures, stools, stuff" and that he was alarmed by this.

[69] Mr. Sparling testified that some items were removed from the Premises in June, but that no fixtures had been removed. He testified that some bar stools were

put into storage and that some art might have been as well. Mr. Khaneja testified that some bar stools had been moved into storage, and that he believed a surplus meat slicer had been removed from the kitchen. Mr. Sparling and Mr. Khaneja both testified that nothing affixed had been removed and, in particular, that no light fixtures had been removed.

[70] On June 9, 2018, Mr. Sparling sent an email to Mr. Usatch, scheduling a walkthrough of the Premises that week. Mr. Sparling also stated:

> I want to make clear that we will continue paying the rent. I believe Kai has been through the space and removed a few non-fixture items such as stools, but to my understanding no actual fixtures have been removed. If we do choose to remove any trade fixtures, we will notify you as required by the lease.

[71] On June 11, 2018, Mr. Usatch, Mr. Khaneja and Mr. Sparling met outside the Premises for a walkthrough, but no one had keys to the Premises. Following that foiled attempt, Mr. Sparling emailed Mr. Usatch confirming the walkthrough was rescheduled to June 12, 2018. In closing, he wrote:

> As we discussed, we intend to mitigate our losses by either subleasing or pivoting the operating business. That said, we appreciate how amicable you are being by offering to let us walk away from the arrangement and re-leasing the space yourself. We'll be in touch later this week or early next week with what we're proposing.
>
> To confirm, you can continue to deposit our post-dated rent cheques as usual.

F. The June 11 Letter

[72] On June 11, 2018, counsel for Olde Towne sent CRAM a letter (the "June 11 Letter") that read, in part:

> We write … to notify you … that you are currently in default of a variety of your obligations under the lease including, but not limited to, the following:
>
> 1. You have failed to operate the business during normal business hours in contravention of section 3.1 of the Lease;
>
> 2. You have failed to maintain the Premises in a reasonable state of repair and maintain the patio at the rear of the Building in a neat and tidy condition in contravention of section 4.2 of the Lease;
>
> 3. You have failed to reasonably maintain the exterior of the Building in contravention of section 4.3 of the Lease;

> 4. You have made alterations to the Premises and the Building in connection with the installation of audio speakers without the Landlord's consent in contravention of section 4.4 of the Lease; and
>
> 5. You have removed trade fixtures from the Premises without providing notice to the Landlord pursuant to section 6.4 of the Lease. Further, our client has advised us that you have removed fixtures from the Premises (for example light fixtures) which are the property of the Landlord under the Lease.
>
> This notice is being delivered pursuant to section 7.2(b) of the Lease and we note that should you fail, refuse or neglect to correct the defaults enumerated above within 15 days of the date of this letter, the Landlord will have the right to employ those remedies available under the Lease including, but not limited to, those set out in section 7 therein.

[73] Mr. Khaneja testified that his reaction was that none of the five points outlined "held any water". In his view, CRAM did have normal business hours, the Premises were in good repair and comparable to other restaurants and the few small areas painted black at the front looked about the same as they had on the day CRAM took possession. Mr. Khaneja believed Mr. Usatch had long been aware of the Outdoor Speakers. Mr. Khaneja was immediately concerned about Olde Towne's motivation for the complaints, and thought CRAM should just do the minor maintenance required to the complaints.

[74] Mr. Sparling testified that his reaction to the June 11 Letter was that, although the restaurant was temporarily closed, he did not believe that was a breach of s. 3.1. He thought the condition of the Premises was equal to that of most restaurants in the downtown area. He thought the exterior of the Premises looked fine, very similar to how it was when CRAM took possession, and comparable to that of 536. Mr. Sparling agreed, however, that after receiving the letter he realized that his assumption that the Outdoor Speakers were shown on the approved plan was incorrect. It is undisputed at trial that CRAM did not get Olde Towne's approval to put the Outdoor Speakers up. However, Mr. Sparling testified that to the best of his knowledge, the June 11 Letter was the first time Olde Towne had ever said anything about the speakers.

[75] On June 12, 2018, prior to the walkthrough time, Mr. Usatch sent CRAM an email that included the following:

> Thanks for meeting with me yesterday. I look forward to a resolution for all involved.
>
> Just to clarify our position, Olde Towne Development is willing to work with CRAM however as referenced in the notice CRAM received yesterday, the current lease is not in good standing.
>
> Olde Townes offer is and was to work in an amicable and prompt manner to end the current lease.

G. June 12 Walkthrough

[76] The walkthrough took place on June 12, 2018 ("June 12 Walkthrough"). Mr. Usatch, Mr. Khaneja and Mr. Sparling each testified in direct that the three of them did the walkthrough together. I find that to be the case and that they spent around 30-45 minutes doing it.

[77] With the exception of a 12 second video Mr. Usatch made of the washroom areas, there is no objective evidence of the state as of June 12. No one participating in the walkthrough took notes.

[78] There is conflict as to the condition of the Premises at the time of the June 12 Walkthrough, and also as to what was said during the walkthrough.

[79] Mr. Usatch testified that he made his position on the condition of the Premises and need for remedial action very clear during the walkthrough:

> Q At the June 12th meeting, Mr. Usatch, did you have a discussion with Mr. Sparling and Mr. Khaneja about the deficiencies and what needed to be done?
>
> A Certainly. Our conversation during the entire time that we were there was me walking through and outlining very, very clearly that this was a completely unsatisfactory standard for any business to operate in, much less a restaurant.

[80] In his testimony, Mr. Usatch described exterior of the Premises on June 11 and 12 as follows:

> My recollection is that the exterior of the building and specifically the entrance to the restaurant was completely unmaintained. There was garbage; there were leaves; there were cigarette butts; there was a broken planter; there was cracked paint. When I had pushed on the door to see if maybe someone might actually be inside, the bottom part of the door sort of gave way because

> it was only affixed to the top. So the -- the door was in very poor condition. There's cracked paint around the windows, yeah. ...

[81] He also testified that there was cracking paint on the exterior front of the premises.

[82] Mr. Usatch said the Back Patio was a “circus of flies, garbage, grease” and “garbage had sort of overflowed over the handrail into the neighbour’s property”. He described the Back Patio as “filthy” and “absolutely disgusting”.

[83] He also said that following the Closure he would regularly:

> … walk to the back of the hallway and see if, you know, maybe there -- there's some activity back there. And what there was was a lot of activity from flies. There was a cloud of flies. There were buckets of grease overflowing. There was garbage. The entire patio was covered in garbage. It was a very sorry state of affairs.

[84] Mr. Usatch took a video of the washrooms in the Premises during the June 12 Walkthrough. The video is about 12 seconds long. It shows graffiti on the washroom walls. One of the walls with graffiti is painted black and the graffiti is done in white writing (perhaps with chalk or white marker). There is also a white painted wall on which there is graffiti done with what appears to be markers. Graffiti can also be seen on a wall in one of the washroom stalls. There are areas where the drywall in the bathroom has been damaged, and there is peeling paint on what appears to be a tiled area beside the sinks.

[85] Mr. Usatch testified that at the June 12 Walkthrough, he found the condition of the washrooms to be “horrifying” and that they looked like a “back alley”. He described the graffiti as “vandalism”. Mr. Usatch testified that Mr. Sparling had agreed that the washrooms were “in a very sad state of repair”.

[86] Mr. Usatch testified that during the June 12 Walkthrough he “thought” some tables and chairs had been removed from the Premises and it “looked like” some light fixtures “may” have been removed as well. He said the threshold at the front door was not tightly screwed down to the floor and presented a trip and fall hazard.

[87] Mr. Usatch testified that the kitchen hood fan was “dripping with grease” and that this had been extremely concerning to him as he considered it a fire hazard.

[88] Mr. Khaneja testified that the condition of the Premises shown in the June 8 Photos is virtually identical to the condition on the June 12 Walkthrough. On June 22, 2018, Ms. Danzinger attended the Premises and took 10 further photographs (“June 22 Photos”). Mr. Khaneja testified that aside from minor differences, such as the paper being put up on the windows, and some chairs and other items being up on the tables, the condition of the Premises in the June 22 Photos is the same as at the time of the June 12 Walkthrough.

[89] Mr. Khaneja testified that Mr. Usatch did point out some things that he felt were deficient during the June 12 Walkthrough. Mr. Khaneja testified that, in his view, all of the things Mr. Usatch pointed out were minor and that he (i.e., Mr. Khaneja) said so during the walkthrough, but that he also told Mr. Usatch CRAM would “take care of them”.

[90] Mr. Sparling testified that at the time of the June 12 Walkthrough, the Premises were in a similar condition to how they had been for the last two years. He said that no fixtures were identified as missing. Mr. Sparling testified that they did discuss the graffiti on the washroom walls. Mr. Sparling testified that the idea was to allow the wall to be marked up with “lines” and “tags” and then let customers use it as a background for Instagram photographs, and that it was a design element. He conceded that it would be “too generous” to describe it as “graffiti art”, but that the graffiti wall was an intentional use of the space. He said that on the June 12 Walkthrough, the discussion about the walls included the fact that the graffiti area was a design element and that it had been present as such since very shortly after the Conversion. Mr. Sparling testified that Mr. Usatch made it clear that he was displeased by the graffiti, but did not recall Mr. Usatch saying that CRAM could not have a graffiti wall.

[91] Mr. Sparling did not recall any discussion of missing decorative trim on the TV wall or Mr. Usatch directing that drywall needed to be repaired. Mr. Sparling also

could not recall Mr. Usatch saying anything about garbage, cigarette butts or spills in relation to the Back Patio.

[92] Mr. Sparling could not recall Mr. Usatch raising issues about the condition of the Front Patio during the June 12 Walkthrough. Mr. Sparling did testify, however, to having himself, about a week prior to the June 12 Walkthrough, noticed a spot on one planter box where the separate wood pieces had come slightly apart – perhaps a centimetre or so between the pieces – but said that he only saw it because he had been looking very closely and that the spot he saw would not be apparent to a casual observer. Mr. Sparling testified that because his personal office is in the immediate area, he frequently walks by Famous Original and that he would hear music from the Outdoor Speakers as he passed by.

[93] Mr. Sparling could not recall any issue being raised about the threshold at the front door. He could not recall Mr. Usatch identifying any fire hazards or raising fire safety issues during the June 12 Walkthrough.

[94] Mr. Sparling recalled that the Outdoor Speakers were a topic of discussion during the June 12 Walkthrough, but could not recall Mr. Usatch saying the speakers had to be taken down nor his saying that they constituted a default under the Lease. Mr. Sparling said that CRAM's insurance coverage was not raised as an issue during the June 12 Walkthrough.

[95] It was not put to Mr. Khaneja or Mr. Sparling on cross-examination that Mr. Usatch did or said anything specific in the course of the walkthrough (i.e., in terms of giving specific directions). The assertion that Mr. Sparling had made a statement about the "sad" state of the washrooms was not put to Mr. Sparling during cross-examination.

H. CRAM Conduct Following the June 12 Walkthrough

[96] On June 18, 2018, Mr. Sparling sent Olde Towne an email on behalf of CRAM (the "June 18 Email"):

> Hi Aaron
>
> In response to your default letter dated June 11.
>
> We intend to reopen for business to the public this week.
>
> We believe the premises are in good state of repair; the patio is currently being used for storage, as has been the case in the last two years - as it's an area not visible to the public. If this unsuitable to you please provide specific details about what you consider unacceptable.
>
> The present condition of the building exterior is in better condition than when we took possession of the space. Can you please be specific about any deficiencies? As we agreed last Tuesday during our walkthrough, the exterior has been freshly painted.
>
> We believed that the outdoor speakers was approved as part of the original tenant improvements. If this is not the case, we'd like to seek your approval at this time.
>
> Last Tuesday we walked through the space together. As you acknowledged, all the fixtures (Including all lighting) had not been removed. We have no immediate plans to remove any fixtures as they are needed for our ongoing business. The few items that CRAM has disposed of are items such as extra stools, a meat slicer etc. These items are not required for our operations going forward.
>
> We trust that this takes care of all issues expressed in your letter. Please confirm that upon opening this week the lease will be in good standing.

[97] Mr. Sparling said that he sent the June 18 Email because he felt compelled to state for the record that CRAM was not in violation of the Lease, but also wanted Mr. Usatch to know that CRAM intended to address the issues he had identified. Mr. Sparling testified that CRAM had decided to accelerate a re-opening in order to address Mr. Usatch's concerns about the restaurant's being closed. The re-opening plan was to re-open Famous Original as a lunch/ lounge restaurant with a charcuterie-style menu for lunch and afternoon hours (the "Lunch Concept"), while CRAM continued to consider what to do next.

I. The Parkside Meeting

[98] Mr. Khaneja testified that on either June 18 or 19, 2018, he met with Mr. Wilkinson, Mr. Sparling, Mr. Ferris and Mr. Craggs at the Parkside Hotel (the "Parkside Meeting") to discuss options regarding the Premises.

[99] Mr. Khaneja said they discussed Tiverton acquiring an equity stake in CRAM and then operating a Brooklyn-style bar that served only small plates. He said they

discussed terms, timelines, investments, respective equity stakes and potential opening dates. He said the terms were that Tiverton would get a 51% ownership of CRAM, $20,000 would be invested into a “light renovation” of the Premises, and Tiverton would operate the business in the Premises, looking to open in a month or so. Mr. Khaneja testified that he left the meeting with the understanding that they were going to do it and that he told his wife that CRAM had new partners.

[100] Mr. Khaneja said that one of the things they agreed upon at the Parkside Meeting was to create a letter of intent reflecting the terms reached at the Parkside Meeting. After the meeting, CRAM had a draft letter of intent (the “Draft LOI”) drawn up. The Draft LOI is in evidence.

[101] Mr. Sparling was also unable to recall the specific date of the Parkside Meeting. He said they discussed what had been tried with the space to date and thought a burger joint would be interesting. He said that he left the meeting understanding that CRAM and Tiverton were going to partner “in some capacity”, with CRAM backing the partnership financially and Tiverton operating the restaurant on the Premises. He said everyone shook hands at the close. Mr. Sparling said he was excited that they had agreed there would be a partnership arrangement.

[6] Mr. Sparling testified that, in his view, the Draft LOI accurately reflects the conversation and the spirit of the Parkside Meeting discussions. Mr. Sparling said that after the Draft LOI was created, he circulated it to all the CRAM principals for review, and then emailed it to Mr. Craggs and Mr. Ferris on June 20, 2018. The cover email read:

> See attached LOI. Let us know if you guys have any questions. Excited to move forward. :-)

[102] Also, on June 20, 2018, Mr. Wilkinson directed Ms. Danzinger to arrange for some food, to take down the paper and to turn on the lights at Famous Original. Ms. Danzinger emailed Mr. Wilkinson and Mr. Khaneja saying that she had spoken with Ms. Dilan and Ms. Dilan could man Famous Original through to July 5.

J. Tiverton Response to Draft LOI

[103] Mr. Craggs sent a response to the Draft LOI email minutes after it was sent. His email (the "Stand Aside Email") read:

> Thank you for this gentleman, I was literally opening my mail to send you an email when this arrived. Serendipity perhaps.
>
> We received a very terse phone call from Aaron yesterday in response to our intention to partner with you.
>
> Needless to say he was not happy, and has made some veiled threats regarding our future relationship, particularly when it comes time for lease renegotiations for our current leases.
>
> He seems as strongly rooted in fighting you as you him, and feel we need to step to the sidelines for the moment, until the two of you can reach an understanding. While we still have a strong interest in a partnership with you, we do not wish to get caught in the crossfire, nor to we wish to appear as if we are double dealing behind yourself or Aaron's back, integrity is important to us.
>
> We will wait patiently for the outcome of the upcoming battle royale.

K. The June 20 Letter to CRAM

[104] Mr. Usatch testified that he was "shocked" by the June 18 Email, as the Back Patio and the exterior of the Premises were still in the same condition as of June 12, and the Outdoor Speakers were still up on the building. Mr. Usatch said the "disconnect" between Mr. Sparling's response in the June 18 Email and CRAM's failure to remedy "the obvious defaults" he had pointed out during the June 12 Walkthrough prompted him to ask his counsel to respond and to "explain very, very clearly that this was a very serious situation".

[105] On June 20, 2018, counsel for Olde Towne sent a letter (the "June 20 Letter"). The June 20 Letter reads, in part:

> As to the assertion in Chris Sparling's aforementioned email that "we believe the premises are in good [sic] state of repair", our client does not agree with Mr. Sparling's assessment of the matter and has advised us of the following issues in connection with the state of the Premises:
>
> 1. There is considerable graffiti in both the male and female bathrooms;
> 2. There is damage to the drywall in both the male and female bathrooms;

3. There is damaged and/or missing trim pieces in the hallway between the bathrooms and the walk-in cooler;
4. The rear patio is littered with garbage, cigarette butts and appears to have had oil spilled on it in various areas;
5. The paint in the main entrance is cracking and you appear to have failed to install the tile finish as agreed to;
6. The main entrance and front patio area contains garbage, cigarette butts, broken planters and does not appear to have been maintained and cleaned for some time;
7. The door to the main entrance appears to be damaged and is only secured at the top;
8. The threshold below the main door appears to be a trip and fall hazard;
9. The kitchen hood fan appears to have never been cleaned, not cleaned in some time or not cleaned properly; and
10. The fire safety systems on the Premises appear not to have been serviced and inspected adequately.

With respect to the outdoor speakers, we have been advised by our client that the same were never discussed, let alone approved. As such, the presence of those outdoor speakers, in our position, constitutes a default under the Lease by the Tenant. As you may be aware, the Building (as defined in the Lease) has a heritage building certification and improvements to the facade likely require some third- party approvals. If you wish to retain the outdoor speaker installation you must write to the Landlord to request approval of the improvement and provide sufficient detail with respect to how the same is to be installed.

With respect to the comment in Chris Sparling’s aforementioned email that you intend to reopen for business this week, we note that the Lease provides that "the Tenant will conduct its business on the Premises during normal business hours for like businesses in the community” and confirm that if you reopen using limited hours or are open and closed at times that are abnormal for similar businesses in the area, we will take the position that the default has not been cured.

While it was not included in our June 11, 2018 letter, we have been advised that you have failed, refused or neglected to comply with the Landlord's request that you provide him with confirmation of insurance coverage naming the Landlord as an additional insured. This letter should be considered as a notice of default under paragraph 7.2 of the Lease with respect to the Landlord's aforementioned unfulfilled confirmation of insurance request.

Unless the above elements are corrected within 15 days of our letter to you dated June 11, 2018 it is our position that our client, as the Landlord, will be in a position to exercise the default option set out in the Lease including, but not limited to, those set out in paragraph 7.2 therein.

[106] Mr. Usatch testified that he did not bother to respond to the June 18 Email request for approval for the Outside Speakers because Mr. Sparling had not provided detailed information as to how the speakers were proposed to be attached. Mr. Usatch testified that Mr. Sparling "ought to have known" that detailed information was required to obtain approval as he was aware 538 had heritage building status.

[107] In his testimony, Mr. Usatch denied the assertions in the June 18 Email that he had agreed, during the June 12 Walkthrough, that the exterior had been freshly painted and that no fixtures had been removed.

[108] The June 20 Letter itself does not say anything about the exterior paint on the Premises. It refers to the paint "in the main entrance", but on Mr. Usatch's evidence, that refers to the concrete on the ground leading up to the front door. Nor does the June 20 Letter revisit the removal of fixtures.

[109] Mr. Khaneja testified that his reaction to the June 20 Letter was very much the same as his reaction to the June 11 Letter. He did not think the complaints had merit and he was concerned about Olde Towne's motivation. He noted, for example, that Famous Original had a restricted menu and used a separate pizza oven, so the kitchen hood fan for the regular oven was virtually unused. While he believed the Premises were in an acceptable condition, he nonetheless directed Ms. Danzinger to see that the listed issues in the June 20 Letter were taken care of. He testified that he understood that under the Lease CRAM should have 15 days from the June 20 Letter to address the listed issues, but he hoped to get them done more quickly than that.

[110] Mr. Sparling could not recall any communications between CRAM and Olde Towne between the June 18 Email and the June 20 Letter. Mr. Sparling testified that he was taken aback by the tone of the June 20 Letter as the June 12 Walkthrough had been more conversational, and now CRAM was being told to correct things within 15 days of the June 11 Letter. Mr. Sparling thought Mr. Usatch was "scrounging around" for complaints to make and was taking issue with things that had been that way for years.

[111] As noted above in respect of the June 12 Walkthrough, Mr. Sparling was unable to recall most of the issues listed in the June 20 Letter having been so much as raised for discussion during the June 12 Walkthrough. As an example, Mr. Sparling not only testified that he had no recollection of there being any discussion regarding the kitchen hood fan during the June 12 Walkthrough, but he testified that to his recollection the group had not gone into the kitchen area. Mr. Sparling also denied that CRAM had ever agreed to tile the entryway to the front door and said he did not have any idea what the June 20 Letter was referring to in that respect. He testified that he went in and out of Famous Original regularly himself and did not see any trip hazard at the threshold.

[112] Mr. Sparling said he disagreed with the June 20 Letter, but began trying to rectify the issues regardless, including by arranging for the Outdoor Speakers to be taken down. Mr. Sparling testified that CRAM was upset by the June 20 Letter and the Stand Aside Email, but resolved to carry forward with re-opening under the Lunch Concept while considering what to try next. Mr. Sparling testified that there was some discussion within CRAM about finding someone other than Tiverton to partner with and about subleasing.

[113] On cross-examination, Mr. Usatch was taken to the June 22 Photos. He agreed that there was no visible damage to any of the planter boxes at the Front Patio. Asked if he could point out any spots of peeling or problematic paint on the wood parts of the façade, Mr. Usatch maintained that the pictures were taken from too far back (although he was able to comment on the dust on the façade). When shown a Photo that he agreed was only 1.5 to 2 metres back from the front door (and even closer to the sides of the entryway), he agreed that the exterior paint in that Photo looked fine. He did not offer any explanation for why that area would be in a different condition from the rest of the painted façade. Mr. Usatch identified that the black paint on the concrete leading up to the front door of the Premises was worn away (issue five in the June 20 Letter).

[114] Mr. Usatch suggested that the front doors were not hanging in perfect alignment in the June 22 Photos (not apparent to me). He pointed out some damage to drywall inside the Premises, in the form of some minor chipping on the lower corner of a drywall column intruding into the seating area. He testified that he could see an inconsistent patch of colour on the paint on the drywall column (not apparent to me). He felt the colour of the concrete floor appeared blotchy. He conceded that the interior of the Premises as shown in the June 22 Photos appeared to otherwise be in good condition.

[115] Mr. Usatch took issue with the grass growing between the pavers under the Front Patio, but conceded that there was also grass growing, and leaves sitting, on the pavers in the area in front of the Residential Entrance.

L. Operating the Lunch Concept

[116] Famous Original re-opened under the Lunch Concept, with Ms. Dilan working in the Premises, on June 22, 2018.

[117] On June 22, 2018, Mr. Usatch emailed CRAM requesting a second walkthrough of the Premises. In his email, Mr. Usatch describes the Lunch Concept as a “sham” business and he attached a screenshot of a Google business listing Famous Original as “permanently closed”.

[118] Also, on June 22, 2018, counsel for CRAM wrote counsel for Olde Towne a letter stating that:

a) the 15-day period under s. 7.2(b) of the Lease would run from June 20, 2018, as it was the June 20 Letter that gave notice of the defaults alleged, and that CRAM was continuing to address the issues raised;

b) CRAM was operating, and would continue to operate, a “food primary licensed restaurant or lounge” at the Premises;

c) consent to sublease could not be unreasonably withheld under the Lease and CRAM may be seeking Olde Towne’s consent.

[119] The letter also outlined the elements of the unlawful means tort.

[120] Counsel for Olde Towne promptly sent a reply email:

> Thank you for the attached letter. While we will make an attempt to provide you a full response to the issue raised therein once we have instructions from our client, I have attached a copy of our June 11, 2018 letter to point out that the same contains a 15 day notice with respect to the same elements as further described in our June 20, 2018 letter which was simply a response to your clients response to our June 11, 2018 letter and is not a new 15 day notice apart from with respect to the insurance default set out therein.
>
> [emphasis added.]

M. The Conversation with Ms. Dilan

[121] On June 23, 2018, Ms. Dilan was again working at Famous Original. In the afternoon, Mr. Usatch entered along with a few acquaintances. The acquaintances left after 30 minutes or so, leaving Mr. Usatch and Ms. Dilan as the only occupants. Mr. Usatch had a beer and a conversation with Ms. Dilan.

[122] Ms. Danzinger testified that after work on June 23, 2018, Ms. Dilan contacted her and resigned. Ms. Danzinger described Ms. Dilan as being very upset and testified that Ms. Dilan told her she was “shook up” by a conversation she had with Mr. Usatch and she did not want any further work hours at Famous Original.

[123] Ms. Danzinger reported Ms. Dilan’s resignation to Mr. Khaneja. He asked her to arrange for someone else to work. Ms. Danzinger asked Mr. Caulder, who agreed to start on June 25, 2018.

[124] On June 24, 2018, Mr. Khaneja responded to Mr. Usatch’s June 22 email:

> Famous Original has been open to the public since Friday, June 22nd in accordance with our new opening hours; brunch/lunch, 10am - 3pm, Tuesday to Saturday. The issues outlined in your letter dated June 11th have all been remedied.
>
> The restaurant is fully operational and open to the public and has passed all health inspections including one on Friday.
>
> Any attempt to visit the space or further interfere with our business by you or any agent acting on your behalf will be considered an illegal trespass and a violation.
>
> in the near future, we intend to sublease the space (we have had offers for at least $7500 and expect the fmv to be much higher) and/or sell controlling

> interest in the business and are now formally requesting your approval. I remind you that such approval cannot be unreasonably withheld.

N. June 26 Walkthrough

[125] The second walkthrough took place on June 26, 2018 (the "June 26 Walkthrough"). No CRAM principal was available, nor was Ms. Danzinger was able to attend. Ms. Danzinger engaged Lindsay Weir – whom she knew only as a co-worker of a friend – to attend the walkthrough as CRAM's representative.

[126] There were four participants: counsel for CRAM (Peter Harrison), counsel for Olde Towne (Paul Morgan), Mr. Usatch and Ms. Weir. Ms. Weir took notes, and then emailed her notes to Ms. Danzinger including a bulleted list (the "Bullet List"). Ms. Danzinger cut and pasted Ms. Weir's notes, including the Bullet List, into an email report to CRAM.

[127] Ms. Danzinger's email to the CRAM principals read:

> Please find below notes of today's walk through:
>
> … Only Lindsay made notes, the rest of the attendants took photos/videos.
>
> All four attendants walked through at the same time, at no time without Lindsay.
>
> - Kitchen _the hood 16-11-30 tag says needs to be serviced by November 30th, 2016. Company is Crest fire.
> - The toilet cover was discussed that it is on the way and is a non-issue.
> - The outside area has a significant population of flies which led to the assumption that there used to be garbage kept outside.
> - There is significant oil staining on the paved area in the outdoor back patio.
> - There is debris that has been thrown over the side of the back area that is believed to belong to the tenant's of Famous Original.
> - Between the ladies and men's bathroom there is a large wall and it has been identified as "scratched".
> - In front of the electrical panel, there is a movable shelf on wheels that has large oil containers and kitchen products which we have been informed are not permitted.

- In the back hallway Aaron stated that "I let the tenant use for garbage in and out' the wall is badly damaged and the floor itself is dirty and unwashed. [The Back Hallway is not part of the Premises]
- The back door for the corridor has not be cleaned.
- Boxes are piled too high/close proximity to the kitchen air conditioner.
- The grease traps do not appear to have been cleaned in quite some time. Peter said we should give the tenants the benefit of doubt and check when they were last serviced.
- Front door, Arron stated: "the thresh hold is completely loose and is a trip hazard"
- The locking mechanism is gone from the front door (top part).
- Aaron states that there was a promise from the tenant that the entry way is "not ground down or tiled".
- There were some graffiti stickers on a pole near the front door. (Erick will remove these tomorrow).
- Outside there are some little ledges where the windows begin that have not been painted, it should be painted up to the top of the door area. Aaron stated that "it has not been maintained".
- He had the front power washed and wants it done regularly.
- Planter has been smashed on one side.
- Lock box is new.
- Aaron was extremely bothered that the outdoor speakers were drilled into the heritage building that has been in his family for decades. "This is a heritage face".
- Thin poles with strands of lights, Aaron says they need to go, however he didn't have a tangible reason but "wants them gone".
- Inside there is a speaker attached to the fire sign he stated that "he doubts that they are allowed".
- One wall has a missing painting/fixture removed. He did confirm that they were his property.
- He asked Erick about payment/menus. He was told we are operating by cash only and that we do not have menus. He was not happy with this information. This can be easily rectified, if I have instructions to bring back the debit terminals and I can make up a simple menu.

[128] Ms. Weir testified regarding the Bullet List items. In direct, she testified that she observed “significant” flies and “significant oil staining” on the Back Patio, and

saw debris on the ground beside the Back Patio railing. She said she herself saw unpainted “ledges” by the front entrance. She said she saw a “smashed” planter out front, and explained that by “smashed”, she meant that it was broken into several pieces and “not a whole planter”. She described a grease stain on the Back Patio.

[129] On cross-examination, Ms. Weir was shown the June 8 and the June 22 Photos (collectively, the “Photos”).

[130] She said the Front Patio as shown in the June 8 Photos was similar to what she saw on June 26, except that she could not see anything structurally wrong with any of the planter boxes.

[131] Looking at the June 22 Photos, Ms. Weir testified that the photos of the Back Patio looked as she recalled it being on June 26, except that she could not see the stain she had seen on the floor nor any flies. She described the stain she saw as uneven in contour, darker than the rest of the floor, about 25 feet long and resembling a spill mark. She initially insisted she was capable of identifying a stain as a grease stain as a matter of “common sense”, but eventually agreed the stain might have been caused by other things.

[132] With respect to flies, she testified she was certain there were more than 25, and said she would guess around 100. She had no idea what type of flies. She agreed that she had inferred the debris behind the Back Patio came from the Back Patio because it was near the Back Patio.

[133] Mr. Usatch testified that on June 26th the washrooms looked as they had on June 11th, as did the Back Patio. He described significant staining on the Back Patio floor in the area around the central drain and said it appeared to be caused by grease draining into the drain. He pointed out the staining he was referring to in the June 22 Photos.

[134] Mr. Usatch testified that the Outdoor Speakers were still mounted on the building on June 26th.

[135] Mr. Khaneja testified that after seeing the Bullet List, he directed Ms. Danzinger to address all of Olde Towne’s complaints as a blanket instruction. On

June 27, 2018, Ms. Danzinger emailed the Bullet List to a contractor and asked him to start addressing the points and to give priority to anything related to fire systems or hazards. In her email to him, she noted that they were awaiting comments from CRAM's legal counsel and that some of the Bullet List points were unclear (e.g., what was said to be wrong with the entryway to the Premises). Ms. Danzinger also emailed Mr. Caulder, asking him to address some of the items.

[136] Mr. Caulder testified that on June 27, 2018, while he was working at Famous Original, a bailiff entered, evicted him and put a notice of termination of the Lease (the "Notice of Termination") on the front door.

[137] On June 28, 2018, a copy of the Notice of Termination was sent to CRAM's counsel. It reads, in part:

> The Tenant is in default of its obligations under paragraphs 3.1, 4.2, 4.3, 4.4 and 6.4 of the Lease, by reason of its failure to operate the business during normal business hours in a businesslike manner, its failure to maintain the Premises in a reasonable state of repair and maintain the patio at the rear of the Premises in a neat and tidy condition, its failure to reasonably maintain the exterior of the front exterior of the Premises, making alterations to the Premises and its exterior without Landlord's consent, and removing trade fixtures from the Premises without providing notice to the Landlord. The Tenant has failed to remedy this default after the provision by the Landlord of 15 days' notice to cure the default. …
>
> Take notice that the Landlord terminates the Lease effective immediately, pursuant to its rights under paragraph 7.2(f) of the Lease.

[138] On August 12, 2018, CRAM's counsel wrote Olde Town requesting the return of CRAM's $9000 damage deposit under the Lease. Mr. Khaneja testified that Olde Towne did not return it.

V. THE TIVERTON MATTERS

[139] With regard to the 2018 discussions with CRAM about the Premises, Mr. Craggs testified that from Tiverton's view, taking over the Premises as an additional storage and kitchen space would allow Tiverton to create a community kitchen for restaurant prep, expand Ferris' Grill & Garden Patio to serve brunch, possibly expand to catering, and enable Tiverton to bulk purchase.

[140] Mr. Craggs testified that on several occasions after the Closure, but prior to the Lunch Concept re-opening, he and Mr. Ferris went into the Premises to assess the space. Mr. Craggs believes it likely that they went in June, and that they went before paper was put up on the front windows. I am satisfied that Mr. Craggs and Mr. Ferris assessed the Premises between very late May and June 15. Mr. Craggs testified that the appearance of the Premises in the June 8 and June 22 Photos is similar to the condition of the Premises when he and Mr. Ferris were in it.

[141] Mr. Craggs testified that he thought the space could be reconfigured to put a big prep kitchen in the rear area and use the front area as a “dive bar”, offering burgers, fries, and beer (the “Burger Concept”). This would enable Tiverton to have shared prep for all the 536 and 538 restaurants, share staff for staffing flexibility, and capitalize on economies of scale throughout.

[142] At some point in June 2018, Mr. Craggs prepared two spreadsheets (Exhibits 30 and 31) as revenue and cost projections for use in assessing the viability of the Burger Concept (“Burger Concept Projections”). Mr. Craggs testified that he and Mr. Ferris typically did up projections to model out possible Tiverton acquisitions or business changes. Mr. Craggs testified that he and Mr. Ferris used the Burger Concept Projections when considering whether to become involved in the Premises with CRAM.

[143] Mr. Craggs testified about the Parkside Meeting. He described it as a meeting to talk about what a potential partnership would look like and discuss ideas for the Premises’ space. Mr. Craggs did not recall the exact date of the Parkside Meeting, but said that the June 20, 2018 email attaching the Draft LOI was received by Tiverton either one or two days after meeting.

[144] Mr. Craggs testified that by the conclusion of the Parkside Meeting, they had agreed to have a partnership, agreed that Tiverton would have a controlling interest and put no money in, and that Tiverton would assume the Premises and chattels and operate a restaurant in the Premises. He said nothing was put into writing at the

Parkside Meeting, but that he understood that there was agreement on those terms. Mr. Craggs testified:

> We -- you know, I can't say that this -- at this juncture in time it had been entirely decided upon, but the -- the agreement of, that we -- the agreement we had was that we would take over a 51-percent share in -- in a joint venture; that we wouldn't put any cash upfront, we would take over the operating of the business and -- and be the operating partner in that relationship.

[145] Mr. Craggs said he left the Parkside Meeting with the understanding that Tiverton and CRAM were “moving forward”, would continue having discussions, and would enter into an agreement.

[146] On cross-examination, he agreed that it could reasonably be said that CRAM and Tiverton were still in general discussions about a partnership as of June 20, 2018. He agreed that both sides had walked away with plans to negotiate an agreement.

[147] Mr. Craggs also testified about a number of text message threads. These are in evidence through screenshots which Mr. Craggs testified he had taken of the text messages with his phone. Mr. Craggs testified that he and Mr. Ferris routinely communicated with one another by text. There are three threads in evidence (the “Threads”). Mr. Craggs was a text participant in all three threads in question, although there is one in which he himself does not author any text messages. The screenshots of the three threads were entered by consent (as a tab in Exhibit 1, Joint Book of Documents to be Admitted as Exhibits). Accordingly, there are no issues as to authenticity.

[148] The first thread (“First Thread”) is an exchange between Mr. Ferris and Mr. Craggs on June 18, 2018. In confirming authorship, Mr. Craggs testified that he was able to recognize Mr. Ferris’ “writing style” in texting. The First Thread reads as follows:

Tom Ferris	**Dave Craggs**
Heads up. Just get off the phone with Aaron Usatch. Boy is he pissed. He has a major hate on for the Cram guys. Shocked that we went behind his back dealing with them. Says he is going to do everything he can to take away lease. Even threatened us with the prospect of a very unfavourable year renewal after the 7 years. I'm still going to meet with him at 4 tomorrow. He must have just now got wind of a potential deal. Issued grave warnings about the "elephant" in the room that would crush us.... And on and on	
	Elephant in the room? Cram crush us how?
By entering an agreement with them and then double crossing us or who knows what? I told him 5 days ago that this prospect was evolving, so it's hardly news. So they must have sent something to him and the he got unravelled	
	Brother, I am planning to get ahead of him in telling cram what are plans had been regarding Matt etc.

[149] Mr. Craggs testified that he was unable to recall what he had meant by the final reference to Matt.

[150] Mr. Craggs testified that he and Mr. Ferris met with Mr. Usatch in person at Perro Negro (the "Perro Negro Meeting"). He cannot recall the date with certainty, but said the Perro Negro Meeting was after the First Thread and before he received the Draft LOI on June 20, 2018. The Perro Negro Meeting was during the day, and about 30-45 minutes long.

[151] Mr. Craggs testified that he could not recall all of what said during the meeting, but that he clearly recalled "the result". By "the result", he said that Mr. Usatch told them that if Tiverton partnered with CRAM, Mr. Usatch would make Tiverton's next lease negotiation very difficult. Mr. Craggs said Mr. Ferris had responded to that by cautioning Mr. Usatch to be careful of what he was saying and that it could "put him in trouble". Mr. Craggs said the meeting more less ended

following Mr. Ferris' caution. Mr. Craggs testified that the only subjects discussed in the Perro Negro Meeting were Tiverton's potential partnership with CRAM and the possibility of Tiverton leasing the Premises. Mr. Craggs said that at either the Perro Negro Meeting or at another meeting also held in Perro Negro, Mr. Usatch encouraged Tiverton to lease the Premises directly from Olde Towne.

[152] Mr. Craggs testified that following the Perro Negro Meeting, he and Mr. Ferris had a discussion amongst themselves and agreed that Tiverton should stand aside while CRAM and Olde Towne resolved their dispute.

[153] Mr. Craggs testified that there was nothing aside from their discussions with Mr. Usatch that led Tiverton to change its wish to partner with CRAM and that those discussions, and follow-up discussion between himself and Mr. Ferris, led to the Stand Aside Email. He testified that the Stand Aside Email was intended to convey that Tiverton was not going to have further partnership discussions with CRAM as Tiverton was not interested in having an acrimonious relationship with Olde Towne.

[154] The second thread of texts (the "Second Thread") are sent between Mr. Craggs, Mr. Ferris, and Mr. Usatch, and span June 21 and 22, 2018. Mr. Craggs was copied on the threat, but did not contribute any texts. Mr. Craggs testified that in the Second Thread, Mr. Ferris was negotiating with Mr. Usatch about the amount of rent Tiverton would be willing to pay to Olde Towne to lease the Premises.

[155] The Second Thread reads:

Tom Ferris	**Aaron Usatch**
In regard to famous: $7.5K for the space Is too expensive for us. Our concept is for a simple 5 night a week operation that cannot support that type of rent. We do not have the desire to run any new location 7 days a week, morning, noon and night any longer. Their lease is the figure that works for us. Let us know if you cannot find a way to seeing them gone. We still find partnering with them our best option. We will wait for	

your ok on the matter and frankly wish everyone the [word obscured].

Hi Tom, I just called dave and I think we can work something out on this he suggested we meet tomorrow afternoon would 230 work for you?

Yes

Ok see u guys tomorrow

Perhaps what was missing from last meeting: what we have planned for the space is a late night eatery: cool space, great little menu, five nights a week. If we grossed $300K I would I be surprised but happy. The rent therefore would be about 2K per month for that concept. Sure, we plan to use some of the space for the main operation, and that 2K spaces are hard to find. But that space is simply not worth $5 or $6K to us for the main operation. That is a luxury we cannot afford. That's why we are looking for the lower figure. And even that is too high

I hear you and want to work with you. Lets talk further about this tomorrow.

[156] The final thread (the "Third Thread") is an exchange between Mr. Craggs and Mr. Usatch. The exchange starts on June 28, 2018 and concludes on June 29, 2018. In the earlier text, Mr. Usatch asks Mr. Craggs what he and Mr. Ferris are willing to pay, and after some exchange, Mr. Craggs asks Mr. Usatch what he has in mind. Mr. Usatch responds:

> Just put your best offer forward for my consideration, keeping in mind that it's now a vacant space and that whatever deals we were talking about previously are off the board.

[157] Mr. Craggs testified that after the Third Thread there were no further discussions between him and Mr. Usatch regarding Tiverton possibly leasing the Premises.

[158] Mr. Craggs also testified regarding a number of photographs he took of the Back Patio and Back Hallway at some point in 2019/2020, when the tenant that succeeded CRAM was operating in the Premises (the "2019 Photos"). He testified that he took the 2019 Photos because he thought the areas were in a "deplorable state" and wanted a record of the condition.

[159] In the 2019 Photos, the Back Hallway is shown having recycling and garbage bins with loose rubbish, cardboard boxes and bottles around them. Small pieces of black material are scattered across on the floor. Mr. Craggs testified that he saw the Back Hallway almost every day at work and that during that period the Back Hallway was often in a similar condition. The 2019 Photos show the Back Patio as seen from the rear of the 536 property. The Back Patio is being used for storage area and is fully crammed with objects, including: garbage and recycling bins, loose cardboard boxes, multiple plastic storage drums, beer kegs, used restaurant equipment, piled plastic milk crates, and a very large yellow ladder.

[160] Mr. Craggs testified that about a year before the trial, Mr. Usatch asked him whose "side he was on" and said that if Mr. Craggs testified it would go very poorly. Mr. Craggs said he asked poorly for whom, and that Mr. Usatch indicated that he meant himself. Mr. Craggs said he told Mr. Usatch that he was on no one's side and that all he would say was what was true.

[161] Mr. Usatch testified that he had a good relationship with Mr. Ferris, was amicable with Mr. Craggs, and had never threatened or tried to intimidate them or Tiverton at any time.

[162] Mr. Usatch testified that Mr. Ferris would periodically express interest to him in leasing additional space, including the main floor of 538. Mr. Usatch denied making any threats or attempting to intimidate anyone at the Perro Negro Meeting. He testified that he had said at the Perro Negro Meeting that he was hopeful that CRAM would cure the default and had asked Mr. Ferris and Mr. Craggs not to interfere by purchasing any restaurant furnishings from CRAM, but rather to wait and

see what happened with the Premises. (Mr. Usatch's version of the conversation at Perro Negro was not put to Mr. Craggs in his cross-examination.)

VI. THE USATCH-DILAN CONVERSATION (JUNE 23)

[163] Mr. Khaneja testified that, in or about 2016, CRAM had nine or ten Nest cameras put up in Famous Original for security reasons. The Nest camera system works on wifi. It enables someone with a passcode to view the live stream and access recordings. All of the recordings automatically upload to an associated cloud account. Mr. Khaneja, Mr. Sparling and Mr. Wilkinson each had the passcode for the account.A stored recording can be downloaded from the cloud account for a 30-day period. After the 30-day period passes, the recording is no longer accessible.

[164] The cameras installed in Famous Original have both video and audio capability. Mr. Khaneja testified that they had requested they be set for video only, but the installer had mistakenly failed to turn audio off on one camera. Mr. Khaneja testified that in normal pizzeria operations the audio was impacted by the music playing inside the restaurant. The cloud account was not routinely monitored, although Mr. Khaneja, Mr. Sparling and Mr. Wilkinson could and would occasionally check the live feed to see whether it was busy.

[165] Mr. Khaneja testified that some time after Ms. Danzinger told him about Ms. Dilan's resignation, it dawned on him that he could review the recording. Mr. Khaneja then downloaded the portion for the period of time Mr. Usatch time was inside Famous Original on June 23, 2018. He downloaded the recording as a videofile, saving it as a video ("Video") on his personal computer. He forwarded the Video to Mr. Sparling and Mr. Wilkinson and later to their legal counsel. Mr. Khaneja testified that he made no alterations or edits to the Video.

[166] There are statements made by Mr. Usatch in the Video that are said to corroborate Mr. Ferris' text statements in the Threads and Mr. Craggs' testimony about what was said at the Perro Negro Meeting. The Video also contains the statements that form the basis of the defamation claim.

[167] At examination for discovery, both the Video and a transcript of the dialogue in the Video (the “Transcript”) were put to Mr. Usatch. Mr. Usatch acknowledged that he was in the Video and spoke with Ms. Dilan. Mr. Usatch agreed that at after the others left, he and Ms. Dilan were the only people in Famous Original.

[168] The entire Video was played in court. Much of the Video is inaudible. However, there are periods when the audio is clear and where voices are recognizable. At discovery, Mr. Usatch admitted that certain statements could be clearly heard, that the speaking voice was his own, and that the Transcript accurately reflected his words as recorded in the Video. Questions and answers from that discovery were read into evidence.

A. Past Conversation with Mr. Ferris and Mr. Craggs

[169] Mr. Usatch agreed there were identifiable comments in the Video where Mr. Usatch is telling Ms. Dilan about a prior conversation he had with Mr. Ferris and Mr. Craggs. The relevant portions of Mr. Usatch’s discovery transcript include the following:

> 151 Q I'm going to suggest to you, sir, that that recording is accurate. What you heard being said was your voice uttering the words:
>
> > "I just – I was – oh my god I was ready to freaking pop because I saw these guys. I stand there and watch Tom and Dave, and I said to the guys 'what the fuck? I told you. Do not interfere with my business.’"
>
> Do you accept, sir, that that's what was recorded and that you uttered those words?
>
> A Yes.
>
> 152 Q And the reference to Tom and Dave is to Tom Ferris and Dave Craggs?
>
> A I'm not sure.
>
> 153 Q Other Tom and Dave's you know?
>
> A Yeah.
>
> 154 Q And other ones who you would say to them: "What the fuck? I told you. Do not interfere in my business."
>
> A I'm sure I may have said that to somebody at some point in time.
>
> 155 Q Tom and Dave?
>
> A Perhaps.

156 Q So you would have said to - and this Tom and Dave who you would have uttered that to, can you tell us their names?

A It would suggest that in this case it's Tom Ferris and Dave Craggs.

157 Q Okay. So with respect to this passage you agree what it says is that I stand there and watch Tom – Tom being Tom Ferris —- and Dave, being Dave Craggs, and that you said to them:

> "What the fuck. I told you. Do not interfere with my business."

A I really cannot recollect when I could have had that conversation with them.

158 Q Is it fair to say, though, sir, that that is what is recorded in the audiovisual recording?

A That's what it says there, yes…

159 Q And then you have the words on the audiovisual recording which I'm going to suggest to you are accurately reproduced that state:

> "And 'no, no, no, Aaron, we're not going to do that. We're going to wait till this is all sorted out'."

Do you accept that the transcript is accurate in reproducing what was said on the audiovisual recording?

A No. I can't tell from the audio.

160 Q Shall we play it again for you, sir?

A Sure.

…

165 Q And what's recorded is accurately transcribed in the transcript?

A Yes, it is.

…

173 Q Tradesman. And then you -- at the end of that passage you heard the female asking you the question in reference to Tom, whether Tom is the owner of Ferris?

A I think the conversation that this might be referring to —— I somewhat recollect Dave and Tom mentioning to me that they were buying some of the leasehold improvements or items, and my concern at the time, I would surmise, was that they were purchasing items that actually belonged to the landlord that because the lease was cancelled would form the chattels, and there would be nothing left to basically sell off to cover my losses. So rather than them purchasing items which didn't belong to the tenants or the —— or —— that didn't belong to the tenants I think what may have transpired was me telling them, don't interfere with this process because, you know, you might be purchasing items that aren't – don't belong to the tenants to sell anymore. If we've cancelled the lease and there's damages and I have to sell off the chattels, you know, you don't want to be buying things that aren't yours or aren't the – you know, from the wrong owner.

…

192 Q So perhaps it was clearer to you, witness, this time. I'm going to suggest to you that the transcript beginning at line does accurately reproduce –

A That does.

193 Q —— the audiovisual recording.

A That does.

194 Q And what it states is:

> "It's betrayal. Like, you know the people for 23 years, and I've always been fair with them."

And in that context there, 23 years and you've always been fair with them, you would be referring to Mr. Tom Ferris and Mr. Dave Craggs?

A It sounds like it.

195 Q And then it goes on to state:

> "Like, honestly, in a lease —— in a commercial lease situation as a landlord, you can really be an asshole if you want."

Do you accept that you uttered those words, sir?

A I accept that I did.

B. Alleged Defamatory Statements

[170] Some of the questions and answers read in from Mr. Usatch's discovery transcript are framed by reference to the Transcript. At discovery, Mr. Usatch agreed the voice identified in the Transcript as the "FEMALE voice" was the woman he spoke with at Famous Original (i.e., Ms. Dilan) and that the voice identified in the Transcript as that of "MALE 1" is his own.

[171] The underlined statements (collectively, the "Statements") in the quoted Transcript set out below are alleged to be defamatory:

FEMALE: Yeah. So basically I (unintelligible) for a bit, and then Joanna's, like, "Hey, I have a second gig for you." So - -

MALE 1: Oh, totally (unintelligible)

FEMALE: Yeah.

MALE 1: For sure.

FEMALE: Yeah.

MALE 1: Yeah. Honestly, don't stress about it.

FEMALE: Yeah.

MALE 1: Seriously, it's all good.

FEMALE: Well, text me – text me your name.

MALE 1: I will. I will.

FEMALE: I mean, I just would feel more comfortable if we had each other's numbers.

MALE 1: I would be happy to do that. I'll send it to you right now.

FEMALE: And yeah, I wouldn't call Joanna (unintelligible) paid for the last couple of days. (Laughing).

MALE 1: Before you have a conversation with Joanna -

FEMALE: Yeah. Okay.

MALE 1: Get paid. You can tell her whatever you want after, but I'm telling you, get paid first.

FEMALE: Okay.

MALE 1: Every person, without an exception, that did business with these guys got screwed. [**"First Statement"]**

FEMALE: Really?

MALE 1: And there were like, 15 liens on my building before they even opened up for business. Every one of the trades that did work for them didn't get paid. And they had to get a lawyer to fight them, and they settled for less money. [**"Second Statement"]**

FEMALE: So how -- how are they, like, doing that? Like, how -- how are they.

MALE 1: (Unintelligible) if you've got money, you got power.

FEMALE: If you have money, then why would you do it? That's just --

MALE 1: That's what I don't understand.

FEMALE: Yeah.

MALE 1: You know why? They're fuckers. If you want to be a fucker -- if you don't think that people's time is valuable because you have no respect or decency or integrity and you have fuck-you-money? You say fuck it. What are we gonna do? Get a lawyer. Okay? Your lawyer fights. "Damn it, I'm right." They spent $20,000 on a lawyer fighting before paying their water bill. [**"Third Statement"**]

[underlining added]

[172] Mr. Khaneja testified that the CRAM did not caused 15 liens to be filed against 538, that CRAM's trades did not hire a lawyer to fight with CRAM, and none of the trades CRAM engaged had settled for less money. Mr. Khaneja denied that CRAM spent $20,000 fighting a water bill. As already noted, Mr. Khaneja testified that CRAM paid out the Sculpin lien in order to get the lien removed.

[173] At discovery Mr. Usatch agreed that 12 liens had been filed against 538 in relation *to Olde Towne's 538 renovations* and those were filed prior to CRAM's becoming a 538 tenant. He agreed that only one lien was put on the 538 after CRAM was a tenant, which the April 2016 Sculpin lien.

[174] Mr. Usatch admitted at discovery that he made the First Statement. Asked if he was referring to the owners of CRAM, the exchange went as follows:

> 253 Q And with respect to:
>
> > "Every person, without an exception, that did business with these guys got screwed."
>
> "These guys" are Rajiv Khaneja, Andrew Wilkinson and Christopher Sparling. Do you accept that?
>
> A It doesn't say that in the transcript.
>
> 254 Q And the context here is that you're talking about Joanna —- or, sorry, Ms. Dilan getting paid; isn't that fair?
>
> A I don't believe so.
>
> 255 Q So if you go back, if you just move up the page slightly ——
>
> A As I mentioned to you in my last response, I can't determine who I'm making these comments about.
>
> 256 Q Is there anyone else who has 15 liens on your building?
>
> A Lots of them.
>
> 257 Q And who has 15 liens on your building?
>
> A None of your business.
>
> 258 Q Sir, I think you can read as well as I can ——
>
> A I can read just fine. Thank you.
>
> 259 Q And you can see that the evidence that you've given --
>
> A I understand what I've said to you.
>
> 260 Q Sir, I'm going to put it to you that there is only Cram Food Group, the principals of them --
>
> A M'mm-hmm.
>
> 261 Q —- that you are referring to in this transcript. Do you accept that?
>
> A I don't accept that. I may be referring to them. I may be referring to somebody else. I don't understand from the transcript whether I'm speaking specifically about the owners of Cram Food Group or Tom Ferris or Dave Craggs or anybody else. It doesn't -- it's not able to be determined from that, so can we just move forward?
>
> …

> 269 Q And then what it says is, at line 17:
>
> "Before you have a conversation with Joanna ——"
>
> Ms. Dilan says:
>
> "Yeah. Okay."
>
> Then you state:
>
> "Get paid. You can tell her whatever you want after, but I'm telling you, get paid first."
>
> And I'm suggesting to you, sir, that the context is clear that you're referring to the owners of Cram Food Group.
>
> A I might well be expressing concern about their payment policies since none of the trades or few of the trades that participated in the tenants' build-out got paid in a timely fashion. […] There were liens that were placed on my property based on work that was not paid by Cram Foods. […] So I may be referring to the owners of Cram Foods. If they did business in a manner that was honourable, I wouldn't refer to them in that manner. Maybe I said there were 15 liens. Maybe I didn't get the number right. But there were liens.
>
> Q Okay.
>
> A There were dishonest business practices.
>
> 271 Q And dishonest business practices by Rajiv Khaneja?
>
> A Cram Foods engaged in an operation in my property where I was misled as to the nature of the business. I was confounded at every attempt to be reasonable with them from the beginning. […] And the entire time I had to fight them for everything, even the most basic, reasonable water bill. So yes, I may have spoken out of turn. I may have been implied that there were 15 liens when there were three or five liens. I really don't give a damn. […] So I might have been referring to your clients. I can't say.

[175] Mr. Usatch admitted at discovery that he made the Second Statement. Asked whether he was referring in it to the owners of CRAM, Mr. Usatch said he could not say for certain, but that it was possible that he was.

[176] Mr. Usatch admitted at discovery that he made the Third Statement. Asked if that statement referred to the owners of CRAM, he said:

> A I could be referring to Cram Foods because Cram Foods failed to install a water meter and then claimed that they didn't have to pay water. We ended up going through a lengthy negotiation and then we ended up having to go to arbitration to obtain payment of the water bill. […] So I may be referring to Cram Foods when it comes to that.

[177] Mr. Usatch then added that a lot of corporations don't pay their water bills, and that he has managed properties with tenants who don't pay their water bills, and thus he could really have been referring to anyone.

VII. POSITIONS OF THE PARTIES

A. Notice of Civil Claim

[178] CRAM says Olde Towne did not terminate the Lease in accordance with the terms of the Lease. CRAM says the June 11 Letter was insufficiently precise to constitute effective and meaningful notice, and the Notice of Termination came less than 15 days after the June 20 Letter. Thus, Olde Towne did not give notice that complied with s. 7.2 of the Lease.

[179] CRAM also says Olde Towne breached its duties of honesty and good faith in its contractual performance under the Lease because it had resolved to terminate the Lease prior to purporting to give notice and regardless of anything it saw on the June 26 Walkthrough: *Bhasin v. Hrynew*, 2014 SCC 71 at 65, 73.

[180] CRAM pleads the tort of inducing a breach of contract. CRAM alleges that CRAM and Tiverton concluded an oral contract at the Parkside Meeting ("Parkside Contract"), and that the defendants knowingly induced Tiverton to breach that contract.

[181] CRAM also pleads the unlawful means tort. Based on the alleged Parkside Contract, CRAM claims the defendants made threats to Tiverton regarding the Olde Towne-Tiverton lease in order to prevent Tiverton from proceeding with the Parkside Contract. In the alternative, if there is no Parkside Contract, then CRAM pleads that the defendants made those same threats in order to prevent Tiverton from entering negotiations with CRAM to develop and operate a restaurant in the Premises with CRAM. CRAM says the threats would be actionable by Tiverton against the defendants, either as the tort intimidation or as a breach of the Olde Towne-Tiverton lease.

[182] CRAM seeks damages for the alleged economic torts based on contract law principles, and thus seeks the same damages in tort as it seeks in contract. Because it seeks the same damages in contract and in tort, CRAM characterized its claims as alternatives. However, if it is determined that the Lease was lawfully terminated on June 27, 2018, CRAM's tort damages would be significantly impacted.

[183] CRAM also seeks aggravated and punitive damages based on the defendants' conduct.

[184] The Statements are claimed to have been defamatory of CRAM, Mr. Khaneja and Mr. Sparling. CRAM does not seek damages, but the individual plaintiffs plead that the Statements were false and damaging to their professional, business and trade reputations. Mr. Khaneja and Mr. Sparling seek damages of $30,000 each.

[185] The plaintiffs' unjust enrichment claim was not pursued in closing submissions.

B. Response to Civil Claim

[186] The defendants rely on the June 11 Letter as notice for the purposes of the Notice of Termination. They rely on the June 20 Letter only as a warning to CRAM that the 15-day notice period under the June 11 Letter was running. The defendants say that all the "deficiencies" noted under the June 11 Letter were not cured by June 26, 2018, putting Olde Towne in a position to lawfully terminate the Lease. In particular, they assert that the re-opening of Famous Original under the Lunch Concept was a "sham" business and did not cure CRAM's default under s. 3.1 of the Lease.

[187] The defendants' did not squarely address the plaintiffs' argument that the June 11 Letter was too vague and imprecise to constitute effective notice for purposes of the Lease.

[188] The defendants say the evidence does not establish the existence of a Parkside Contract for either the tort of inducing breach of contract or the unlawful

means tort. The defendants say the evidence establishes nothing more than a non-binding agreement to have further discussions. They also submit that even if a Parkside Contract were to be found, there is no evidence the defendants knew of its existence.

[189] With respect to the unlawful means tort, the defendants assert that it is speculative to assert that Olde Towne would have approved any new tenant of the Premises, especially given that nothing was ever provided to Olde Towne for consideration. They also assert that the Tiverton-Olde Towne lease "was never interfered with" by the defendants.

[190] With respect to damages, the defendants say that the plaintiffs ought to have mitigated their losses by concluding some other form of business agreement with Tiverton and/or by opening their Burger Concept or some other business in another Victoria location.

[191] With respect to the defamation claim, the defendants assert that the plaintiffs should not be permitted to rely on the Video for multiple reasons, namely: it was made in breach of s. 191(3) of the *Criminal Code*; it was made in breach of Mr. Usatch's privacy rights; and the plaintiffs, in breach of their discovery obligations, have not produced any videos for any other days in May and June 2018.

[192] If the plaintiffs are allowed to rely on the Video, then the defendants assert that the Statements were not actionable, were not about the plaintiffs, and, if they were about the plaintiffs, were either true or fair comment. They also say that that there is no evidence that Ms. Dilan repeated the Statements.

[193] Finally, the defendants say that even if the defamation claim is made out, damages should be nominal or minimal.

C. Counterclaim

[194] Old Towne claims that CRAM was in default of its obligations under the Lease as outlined under the June 11 Letter and failed to cure those defaults. Olde Towne

seeks damages in connection with CRAM's defaults under the Lease, including lost rent and fees paid to real estate and legal professionals in connection with releasing the Premises. They also claim indemnification for the costs in defending this action.

[195] In response to the counterclaim, CRAM denies that it breached s. 3.1 or any tenant covenants under the Lease and, in the alternative, that if any default did occur, it was minor and insignificant and did not justify a termination of the Lease.

VIII. CREDIBILITY AND RELIABILITY

[196] In assessing credibility, I rely on the principles as set out in the often-cited passages of *Faryna v. Chorny*, [1952] 2 D.L.R. 354, 1951 CanLII 252 (B.C.C.A.) at 357, and *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296 leave to appeal ref'd, [2012] S.C.C.A. No. 392. Credibility concerns the veracity of a witness: truthfulness. Reliability involves the accuracy of the witness's testimony, and requires consideration of the witness' ability to observe, recall and recount what occurred: *R. v. Khan*, 2015 BCCA 320 at para. 44.

[197] The factors to be considered when assessing credibility were summarized by Madam Justice Dillon in *Bradshaw* at para. 186:

> Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (Raymond v. Bosanquet (Township) (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.),* 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[198] Both parties take issue with the reliability and credibility of the other sides witnesses.

[199] I found Mr. Khaneja to be a credible and reliable witness. It was apparent that his primary focus was the business aspects of CRAM, but he readily conceded the limitations on his personal knowledge. He did not purport to have in-depth knowledge of day-to-day operations, and he did not attempt to give evidence that exceeded his scope of knowledge.

[200] Unlike Mr. Sparling's, Mr. Khaneja's testimony regarding the condition of the Premises on June 12 and June 26 was not factually detailed. Mr. Khaneja tended to describe things by comparison to the Premises at the time of the opening of Famous Original. However, his opinion on comparative condition was well informed, as he had been responsible for reviewing the bills relating to the Conversion and had, during the course of the Conversion, visited the Premises about weekly to monitor progress and ensure that CRAM was getting what it was paying for. For the same reason, Mr. Khaneja was also familiar with CRAM's assets and the fixtures in place at the Premises. Mr. Khaneja had an office nearby the Premises and regularly passed by over the course of his day, and thus was able to keep up to date with respect to the condition of the exterior and Front Patio.

[201] The defendants assert that Mr. Khaneja lied in his June 24, 2018 email when he said the June 11 Letter issues had been remedied. The defendants also take issue with statements of fact plead in CRAM's Response to Counterclaim (e.g., that there was a restaurant operating continuously until June 27th, that the Premises were maintained to an appropriate standard, and that maintenance was completed in June 2018). All of these assertions, including the June 24, 2018 email, reflect positions taken based on a certain view of the facts, interpretations of the June 11 Letter and of the Lease provisions, and a view as to how the law applies in light of those. None of these statements speak to the credibility of Mr. Khaneja (or Mr. Sparling) as witnesses.

[202] Mr. Sparling was a careful and thoughtful witness. His evidence was specific and detailed. He made concessions readily and, in fact, frequently injected concessions into his direct testimony as a means of clarifying his evidence. Mr.

Sparling also impressed me as being an observant person by nature and as having a good memory. His evidence was detailed and specific. In particular, I am satisfied that had important or significant things been discovered, or had important or significant pronouncements affecting CRAM's interests been made, during the June 11 and June 26 Walkthroughs, Mr. Sparling would have taken note of them and would be able to recall them.

[203] I also find Mr. Craggs to a credible and reliable witness. He recalled the Perro Negro Meeting and the Parkside Meeting as events that made a big impression on him. I note that although Mr. Craggs is not particularly good with dates, his recall of the order of significant events in his testimony was accurate and his testimony aligned with documentary evidence.

[204] The defendants assert that Mr. Craggs cannot be considered an independent witness given the corporate relationship between Tiverton and Four Top beginning in 2021 and given Mr. Craggs' management of Four Top. I agree that this is a factor that must be accounted for in assessing his evidence, but, having accounted for it, I am satisfied that Mr. Craggs' testimony was forthright and not self-serving. I note that the plaintiffs' claim as originally filed in November 2018 alleged the unlawful means tort, thus Mr. Craggs' involvement as a factual source regarding Mr. Usatch's statements at the Perro Negro Meeting considerably pre-dates the 2021 corporate relationship. I note that, even as of trial, Tiverton continues to lease 536 from Olde Towne, and Mr. Craggs continued to directly own part of Tiverton, such that giving evidence in the plaintiffs' case at trial could also be considered contrary to Mr. Craggs' personal interests.

[205] I am satisfied that Ms. Danzinger's and Mr. Caulder's testimony were credible and reliable. Mr. Caulder's memory of the events and condition of the Premises was vague, but that is to be expected given his role the events and he did not attempt to claim otherwise.

[206] I found Mr. Usatch an unsatisfactory witness. His testimony was peppered with self-serving asides. He was resistant and evasive on cross-examination, often

openly conveying displeasure when attempts to deflect questions did not succeed. He was prone to hyperbole in both direct and cross. He was not hesitant to recharacterize matters to suit his ends.

[207] I am satisfied that Ms. Weir's testimony is coloured by a determined resolve to support the defendants' case. Although presented as a neutral witness in Mr. Usatch's testimony and in her own direct, cross-examination disclosed that she and Mr. Usatch have been part of the same friend group for over 20 years. She had dinner with Mr. Usatch (along with a mutual friend) the night before she testified. Ms. Weir displayed a hostile attitude under cross-examination. I am also satisfied that Ms. Weir's support of Mr. Usatch is also reflected in the Bullet List.

[208] As an example, Ms. Weir testified on June 26, a planter at the Front Patio was "smashed" into pieces such that the planter was no longer "whole". That is fundamentally inconsistent with the June 22 Photos, which show the planters in good condition. That testimony is inconsistent with her own language in the Bullet List, which states: "Planter has been smashed *on one side*" (emphasis added).

[209] The planters at the Front Patio are not free-standing. They are large, trough-like planters that are built into, and form an integral part of, the wood framing comprising the bench seating for the Front Patio. The condition of the planters, as shown in a significant number of Photos, as taken from a variety of different perspectives, is consistent with the testimonial descriptions given by Mr. Sparling, Mr. Khaneja and Ms. Danzinger. In my view, the planters in the Photos are in reasonably good condition.

[210] Similarly, Ms. Weir's description of a 25-foot-long "spill" stain on the Back Patio is unsupported by the June 22 Photos. Her description of the stain is also inconsistent with Mr. Usatch's testimony, which was about staining near the centre drain and which he testified could be seen in the June 22 Photos. On my own review of the June 22 Photos, the Back Patio floor comprises four slabs of concrete with a drain hole at the centre intersection. The concrete looks much as one would anticipate concrete in an area open to the elements to appear. The concrete is

somewhat darker in the centre near the drain, but that is where water would pool in the course of draining. In my opinion, the condition of the Back Patio floor is unremarkable. There are no overflowing vats of kitchen grease. It is unremarkable restaurant operation storage.

IX. EVIDENTIARY RULINGS

A. Authenticity of Conversion Invoices

[211] An array of receipts said to relate to the Conversion expenses were entered into evidence (the "Conversion Invoices"). The defendants objected to the admissibility of the Conversion Invoices on the basis that original copies were not produced. Following a *voir dire* in which Mr. Khaneja testified as to CRAM's book-keeping practices, I ruled that the Conversion Invoices were sufficiently authenticated to be admissible.

[212] Mr. Khaneja testified that CRAM operated, to the extent it was able to do so, a paperless office. Hard copies and originals were retained only as required by the Canadian Revenue Agency or otherwise necessary for business purposes. Notably, CRAM has no "central office". Having electronic records gives each CRAM principal full access and the ability to review the records from their individual offices.

[213] As a routine practice, CRAM employees were asked to photograph or scan paper invoices and send the digital version to accounting. Mr. Khaneja testified that he did this himself when he had a paper receipts or invoice for CRAM, and then discard the paper version. Accounting entered electronic documents in a cloud-based commercially available accounting program. The reliability of CRAM's programs were not challenged on cross-examinations.

[214] Further, Mr. Khaneja testified that he had vetted the Conversion Invoices that were entered into the system in something close to real time during the Conversion, to ensure CRAM was only paying for work and materials that were authorized and received. He testified that he went by the Premises about weekly for that purpose.

[215] The best evidence rule is a common law rule. As a common law rule, it has evolved over time. This evolution was described by Butler J. (then of this Court) in *R. v. Hamdan*, 2017 BCSC 676:

> [63] The best evidence rule requires a party tendering evidence to provide the original rather than a copy, if the original is available. Quoting Halsbury's Laws of England, 4th ed., vol. 17, para. 8, our Court of Appeal considered the logic behind the rule in *R. v. Betterest Vinyl Manufacturing Ltd*. (1989), 1989 CanLII 7251 (BC CA), 42 B.C.L.R. (2d) 198 (C.A.) at 204:
>
> > The logic of requiring the production of an original document where it is available rather than relying on possibly unsatisfactory copies, or the recollections of witnesses, is clear, although modern techniques make objections to the first alternative less strong.
>
> [64] In *Betterest*, the court reviewed authorities from Canada and other jurisdictions which have taken a more relaxed approach to the best evidence rule. The court referred to the following statement in *U.S. v. Knohl*, 379 F. 2d 427 (C.A., 2nd Circ., 1967), which was approved by the Ontario Court of Appeal in *R. v. Swartz* (1977), 1977 CanLII 1925 (ON CA), 37 C.C.C. (2d) 409 (Ont. C.A.) at 411-12, aff'd *Papalia v. R*., 1979 CanLII 38 (SCC), [1979] 2 S.C.R. 256:
>
> > The rule is not based upon the view that the so-called secondary evidence is not competent, since, if the best evidence is shown to be unobtainable, secondary evidence at once becomes admissible. And if it appear, as it does here, that what is called the secondary evidence is clearly equal in probative value to what is called the primary proof, and that fraud or imposition, reasonably, is not to be feared, the reason upon which the best evidence rule rests ceases, with the consequence that in that situation the rule itself must cease to be applicable, in consonance with the well established maxim -- *cessante ratione legis, cessat ipsa lex*.
> >
> > An over-technical and strained application of the best evidence rule serves only to hamper the inquiry without at all advancing the cause of truth.'
>
> [65] This approach was specifically adopted in *Shaghaghi v. Mozaffarian*, 2002 BCCA 531 at para. 22, where the British Columbia Court of Appeal wrote:
>
> > [22] The "best evidence" rule is not enforced with the strictness that it once was. This Court considered the modern application of the rule in *R. v. Betterest Vinyl Manufacturing Ltd. et al*. (1989), 1989 CanLII 7251 (BC CA), 52 C.C.C. (3d) 441 and concluded that it is now limited to requiring a party to produce the original if it is available. Secondary evidence of the contents of a document may be admitted when the failure to produce the original is explained. [Emphasis added.]

> [66] The modern approach shifts much of the analysis from admissibility to weight. In Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, (3d) ed. (Markham: LexisNexis, 2009) at 1225, the authors write:
>
> > The modern common law, statutory provisions, rules of practice and modern technology have rendered the rule obsolete in most cases and the question is one of weight and not admissibility.
>
> Therefore, an incomplete copy of a document is admissible as secondary evidence with the extent and effect of any omissions or inaccuracies to be considered as an issue at trial.

[216] The BC *Evidence Act*, R.S.B.C 1996, c.124, does not expressly address electronic documents. However, the *Canada Evidence Act,* R.S.C. 1985, c. C-5 [*CEA*] does. This Court has frequently looked to the *CEA* provisions for guidance in assessing admissibility in civil proceedings: *Holden v. Hanlon*, 2019 BCSC 622 at paras. 46-49; *Levington v. Benson*, 2022 BCSC 2171 at para. 45; *Wang v Liu*, 2023 BCSC 972 at para. 56.

[217] The *CEA* contains a number of statutory presumptions for the admissibility of electronic documents: ss. 31.2–31.4. In *Hamdan*, Butler J. (then of this Court) described the policy purpose underlying these presumptions:

> [70] These presumptions seek to ensure that the evidence the court receives is, functionally, the same as the information that went into the computer system. In an age of abundant digital copies, the statute makes allowances for inconsequential differences in presentation and format. In "*Proof and Progress: Coping with the Law of Evidence in a Technological Age*" (2013), 11 C.J.L.T. 181, Paciocco J., as he then was, notes, at 200, that these provisions play a limited role:
>
> > Given the generous statutory conception of an original document, the primary role the "best evidence" provisions in the *Canada Evidence Act* play is as merely as an adjunct to authenticity. The provisions exist, not so much to assure that the best evidence is presented, but to provide some further assurance that the document provided to the courts is the same as the one that was input into the computer.

[218] Evidence can be found to admissible under the *CEA* even where no statutory presumption applies: *Hamdan* at para. 75.

[219] I am satisfied on Mr. Khaneja's evidence that the Conversion Invoices tendered as evidence are, functionally, the same the information that was sent to accounting as a converted digital record. Mr. Khaneja testified that many of the

invoices were sent to CRAM in digital form in the first place (e.g., sent as an attachment to an email by the billing party).

[220] The defendants contend that CRAM's evidence did not establish that it undertook an extensive search for any paper invoices that might have been retained rather than discarded and thus CRAM failed to establish that the original documents were "unavailable" to it. In my view, CRAM was not obliged to establish that in the circumstances. As no one at CRAM was obliged to keep paper copies, if anyone did happen to do so, it would be mere happenstance. There is no obvious place, established by the evidence, that CRAM could reasonably be expected to go check to see if any were kept by happenstance. CRAM is not obliged to take exhaustive measures in order to establish that there are absolutely no paper invoices anywhere in its possession before relying on its digitized copies.

[221] Nor was CRAM obliged, as suggested by the defendants, to re-check with the original billing parties to see if they could provide a paper copy before seeking to rely on the Conversion Invoices. Even if a billing party did generate a paper copy and did keep that copy in their own records, that copy is not CRAM's "original" document.

[222] The modern approach to the "best evidence" rule permits the photos of the Conversion Invoices to be admitted.

B. The Video

[223] The Video (and the Transcript) were admitted into the trial record at the very outset of the trial by agreement as tabs in Exhibit 1 (Joint Book of Documents to be Admitted as Exhibits). Exhibit 1 was not entered subject to the terms of a document agreement, and thus there are no qualifications or reservations on the agreement to admit.

[224] Notwithstanding, the defendants subsequently argued that the Video should be inadmissible. They argue first that using the Video was a breach of s. 191(3) of the *Criminal Code*, and should bar the plaintiffs from its use. Second, the defendants argue that the Video was made in breach of Mr. Usatch's privacy rights. In my view,

these are arguments that cannot be advanced after admitting Exhibit 1 into the trial record by agreement.

[225] On the supposition that the defendants are asserting the Court has a residual to discretion (and without comment on whether there is any), I will briefly address the objections.

[226] Section 193(1) of the *Criminal Code* reads:

> 193 (1) If a private communication has been intercepted by means of an electro-magnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator of that communication or of the person intended by the originator to receive it, every person commits an offence who, without the express consent of the originator of that communication or of the person intended to receive it, knowingly
>
> (a) uses or discloses the private communication or any part of it or the substance, meaning or purpose of it or of any part of it, or
>
> (b) discloses the existence of the private communication.

[227] Setting aside the fact that no argument was addressed to the statutory exemptions (see s. 193(2)(a)), Olde Towne has not established that Ms. Dilan did not consent to the Video. Ms. Dilan is the "person intended to receive" Mr. Usatch's communication in the conversation. This also disposes of the *ex turpi causa* arguments advanced by the defendants.

[228] The admissibility of surreptitious recordings in civil proceedings (more specifically, in family law proceedings) was considered in *Finch v. Finch*, 2014 BCSC 653:

> [55] … [A] number of cases have considered the admissibility of illegally obtained or surreptitiously recorded evidence and the principles drawn from those cases are instructive.
>
> [56] The leading authority in B.C. is *Mathews v. Mathews*, 2007 BCSC 1825. At issue in that family case were diary entries of one spouse that the other had surreptitiously obtained. Mr. Justice Barrow reviewed a number of other B.C. authorities, including *A.D.B. v. E.B*, [1997] B.C.J No. 227 (S.C.) where Mr. Justice Grist considered the admissibility of recordings of telephone conversations between the children and the mother made by the father. Mr. Justice Grist admitted the recordings, stating (at para. 12):

> …the law is clear that if the information is relevant, the identity of the parties known, and the recording trustworthy, the evidence by way of taped conversations should be received.

[57] Similarly in *Sweeten v. Sweeten*, 1996 CanLII 2972 (BC SC), [1996] B.C.J. No. 3138 (S.C.), Master Joyce, as he then was, admitted a single tape recording between the father and a child on an application to vary an interim custody order. Master Joyce suggested that the discretion to exclude the evidence was limited and that, in the circumstances of that case, the best interests of the child militated in favour of admitting the evidence.

[58] Another case of note is *A.M.E.R. v. P.J.R*., 2003 BCSC 1466. In that case, the mother had, over a period of three and one-half years, secretly taped the father's conversations with the children, as well as some conversations between herself and the father. The issue before Mr. Justice Williamson was whether these recordings should be provided to the author of a report under s. 15 of the former *Family Relations Act*, R.S.B.C. 1996, c. 128. While noting that he was not dealing with the admissibility of this evidence as part of a legal proceeding, Mr. Justice Williamson considered a number of cases, including *A.D.B. v. E.B* and *Sweeten*, and concluded that there is a three prong test for determining admissibility of this type of evidence: relevance, identification and trustworthiness (para. 14). He also considered the question of fairness and the effect on the reputation of the administration of justice of allowing evidence of this kind to be used.

[59] After considering these various authorities as well as a number of Ontario cases, Mr. Justice Barrow in *Mathews* held as follows (at para. 43):

> …it is clear there is a limited discretion to exclude relevant evidence in this context. The judicial exercise of that discretion involves a balancing of competing interests which can be usefully viewed as assessing the probative value of the evidence as against its prejudicial effect. …

[229] At para. 62 of *Finch*, Skolrood J. (as he then was) concluded that the authorities favoured admitting a surreptitious recording where the court was satisfied of the following:

a) relevance;

b) identification;

c) trustworthiness; and

d) the probative value outweighed any prejudicial effect.

[230] On consideration of those factors, I would admit the Video. The Video is highly relevant to the issues before me, both in relation to what Mr. Usatch said to

Mr. Ferris and Mr. Craggs, and as to the existence and publication of the alleged defamatory statements. In examination for discovery, Mr. Usatch agreed, with respect to the portions of the Video the defendants rely upon, that he is speaking and that what he said can be discerned. The recording was made by and saved by an automated computer system, and I accept Mr. Khaneja's evidence that it was downloaded and forwarded without any edits or alterations.

[231] The defendants contend that admitting the Video is prejudicial because its admission will bring the administration of justice into disrepute.

[232] The plaintiffs did not lead or induce Mr. Usatch into saying anything on the recording. None of the plaintiffs participated in the conversation. Nor did the plaintiffs set out to audio record Mr. Usatch's conversation, let alone to do so for the specific purpose of litigation. The cameras were installed years earlier for security purposes. With respect to their intended use in the pizzeria at the time of installation, the audio was not intended to be on, and even though one microphone was left on by the installer, discernable conversation was unlikely to be captured by the audio. Notably, the conversation between Mr. Usatch and Ms. Dilan is just barely audible, notwithstanding that they were the people present and the absence of ambient noise.

[233] Further, the Video is not a recording made in a personal residence or in private space, but rather one made in the public area of a restaurant at a time when the restaurant was open to the public. Nor was the captured conversation between family members or others closely associated, but rather one between Mr. Usatch and someone he had just met (and who was known to him at the time to be an employee of CRAM).

[234] I am not satisfied that admission of the recording would bring the system into disrepute. I am satisfied that the Video's probative value exceeds any prejudicial effect arising from its admission into evidence.

[235] Finally, the defendants suggest that it is unfair to allow the plaintiffs to rely on the Video because the plaintiffs did not produce cloud account recordings for any other days in the period of May through June 2018.

[236] With respect to the defamation claim, the June 23rd conversation was a discrete interaction that occurred that one afternoon. The entire period during which Mr. Usatch's was in the Premises was downloaded. There is no assertion that any recording from any other day is relevant context for the Statements.

[237] With respect to the failure to produce all other days in May and June in relation to the other claims, Mr. Khaneja downloaded the recording relating to the June 23, 2018 conversation some days or weeks after the event when it occurred to him that the interaction that resulting in Ms. Dilan's resignation would have been recorded. Mr. Khaneja downloaded the Video for the specific purpose of reviewing that interaction. This is not an instance in which Mr. Khaneja was conducting a review and search for documents for use in litigation and selectively downloaded only what he thought would be of assistance. Mr. Khaneja testified that each recording is retained and accessible for a 30-day period. Outside the period, the recordings ceased to be in the plaintiffs' possession or control. On the evidence, there is no foundation for the defendants' assertion of spoliation.

[238] In conclusion, even if there is a residual discretion following the joint admission of Exhibit 1 into the trial record, the Video would be admitted.

C. Mr. Ferris' Statements in the Threads

[239] There is no dispute that Mr. Ferris' text statements are hearsay. The dispute is whether the statements meet the principled approach to hearsay such as to be admissible for the truth of their contents. In this case, the question of whether Mr. Ferris' texts are admissible as evidence that Mr. Ferris and Mr. Usatch had a conversation and of what Mr. Ferris understood Mr. Usatch to have said in that conversation.

[240] The plaintiffs say that Mr. Ferris' statements meet the principled exception given the circumstances in which the statements were made and given that Mr. Ferris died in 2019. To satisfy the principled approach, a statement must meet the criteria of necessity and reliability: *R. v. Khan*, [1990] 2 S.C.R. 531, 1990 CanLII 77 (SCC); *R. v. Khelawon*, 2006 SCC 57. A helpful discussion of these two criteria in the context of a deceased declarant is found in *Peterson v. Weldwood*, 2018 BCSC 1379:

> [73] Statements attributed to the deceased sometimes require consideration of the "principled approach" to hearsay. Four decisions of the Supreme Court of Canada guide the court's inquiry regarding the principled approach: *R. v. Khan*, 1990 CanLII 77 (SCC), [1990] 2 S.C.R. 531; *R. v. Smith*, 1992 CanLII 79 (SCC), [1992] 2 S.C.R. 915; *R. v. Starr*, 2000 SCC 40; and *R. v. Khelawon*, 2006 SCC 57. The admissibility of hearsay under the principled approach is summarized in *Khelawon*, at para. 2:
>
> > When it is necessary to resort to evidence in this form, a hearsay statement may be admitted if, because of the way in which it came about, its contents are trustworthy, or if circumstances permit the ultimate trier of fact to sufficiently assess its worth. If the proponent of the evidence cannot meet the twin criteria of necessity and reliability, the general exclusionary rule prevails.
>
> (See also *R. v. Bradshaw*, 2017 SCC 35).
>
> [74] The onus is on the party tendering the hearsay evidence to establish the necessity and reliability on a balance of probabilities. The court must assess both the threshold reliability of the statement at issue and the statement's ultimate reliability having regard to the entirety of the evidence: *Khelawon*, at para. 2.
>
> [75] In this case, because the declarant is deceased, his direct evidence is no longer available to the court and the necessity requirement is clearly met. That leaves for determination the issue of the reliability of the various statements attributed to the Deceased.
>
> [76] A court is required to assess the reliability of a statement sought to be adduced by way of hearsay evidence by examining the circumstances under which that statement was made. The principal concern arising from the hearsay nature of the evidence is the inability to test the allegations by way of cross-examination. In *Khelawon*, at para. 105, the Court expounded that:
>
> > … The evidence is not admissible unless there is a sufficient substitute basis for testing the evidence or the contents of the statement are sufficiently trustworthy.
>
> [77] In the absence of circumstances where a deceased declarant left a sworn statement or there were earlier opportunities to examine him under oath, the Court must turn to assess the inherent trustworthiness of a hearsay statement. A circumstantial guarantee of trustworthiness is established if the

> statement was made in circumstances which “substantially negate” the possibility that the declarant was untruthful or mistaken: *Smith*, at 933.
>
> [78] In *Gutierrez v. Gutierrez*, 2015 BCSC 185 at para. 34, Mr. Justice Voith helpfully summarized the factors that can be considered when assessing the threshold reliability of a hearsay statement:
>
> > 1) the presence or absence of a motive to lie (*Blackman* at para. 42; *Khelawon* at para. 67);
> >
> > 2) independent corroborative evidence that "goes to the trustworthiness of the statement" (*Blackman* at para. 55; *Khelawon* at para. 67*; R. v. Couture*, 2007 SCC 28 (S.C.C.) at para. 83);
> >
> > 3) timing of the statement relevant to the event, contemporaneity (*Khelawon* at para. 67);
> >
> > 4) the declarant's mental capacity at the time of making the statement (*Khelawon* at para. 107);
> >
> > 5) solemnity of the occasion and whether the declarant's statement was made "in circumstances that could arguably be akin to the taking of an oath where the importance of telling the truth and the consequences of making a false statement were properly emphasized" (*Couture* at para. 89; *Khelawon* at para. 86).

[241] Again, there was no dispute regarding the authenticity of the Threads. They are in evidence as part of Exhibit 1, the Joint Book of Documents for Admission. Mr. Craggs testified that he took the screenshots using his phone and that the texts were sent from and received on his phone. He testified that he and Mr. Ferris routinely texted one another about Tiverton matters. He further testified that he was well-familiar with Mr. Ferris’ texting style and was able recognize the content of the messages identified by him as being recognizably in Mr. Ferris’ style.

[242] With regard to the First Thread, there is no apparent motivation for Mr. Ferris to lie to Mr. Craggs about having spoken with Mr. Usatch or for him to misrepresent what was said. Mr. Ferris and Mr. Craggs had a common interest in sharing information that would enable them to jointly act in Tiverton’s best interests. I also find it unlikely that Mr. Ferris was mistaken as to what was said in the conversation. Mr. Usatch testified that he and Mr. Ferris had been successfully interacting with one another for decades. Further, the First Thread indicates that Mr. Ferris was writing shortly on the heels of the conversation with Mr. Usatch and thus had the conversation fresh in his mind. Mr. Craggs responded to Mr. Ferris’ texts in the First

Thread in real time exchange. There are no issues regarding Mr. Ferris' capacity. Finally, while the occasion of the communications was hardly solemn, the subject matter and position of the parties provide an assurance that Mr. Ferris understood that it was important to be truthful and accurate. As already noted, Tiverton was a business in which Mr. Ferris and Mr. Craggs were partners and were both substantially invested. They needed to proceed on accurate information in order to effectively protect and advance Tiverton's interests to their mutual benefit. There is also Mr. Craggs' testimony that Mr. Usatch made a substantially similar threat at the Perro Negro Meeting held shortly thereafter.

[243] In summary, I accept that Mr. Ferris made the statements attributed to him in the First Thread, and I find those statements sufficiently necessary and reliable to meet the admissibility threshold. I conclude that the admission of the Ferris statements in the First Thread for the truth of what is stated is justified under the principled approach.

[244] With respect to the Second Thread, Mr. Ferris' statements in the Second Thread do not have the same degree of reliability as those made to Mr. Craggs in the First Thread. To the contrary, Mr. Ferris was negotiating and attempting to influence Mr. Usatch's expectations for rent. However, the Second Thread is admissible for the fact that that Mr. Ferris and Mr. Usatch had those communications with one another over June 21 and 22, 2018.

X. CONTRACT CLAIMS

A. Lease Provisions

[245] For convenience, I will again set out the Lease provisions relevant to the allegations of default:

> 3.1 Business. The Tenant will conduct or cause to be conducted on the Premises the business of a food primary licensed restaurant or lounge or food primary licensed bar and no other business without the express written consent of the Landlord, such consent not to be unreasonably withheld. The Tenant will conduct its business on the Premises during normal business hours for like businesses in the community.

…

4.2 To Repair. The Tenant will keep the Premises, including fixtures, in good and substantial repair. The Landlord may at all reasonable times during the Term enter the Premises to examine their condition and the Tenant will well and sufficiently repair any reasonable defect found by the Landlord within ten (10) business days of a notice so to do. The Tenant's obligation under this paragraph includes the duty to maintain the interior decoration of the Premises in a reasonable state of repair, to repaint, repaper or refinish all wall surfaces within the Premises and to maintain the patio on the Land at the rear of the Building in a neat and tidy condition as may be reasonably required by the Landlord.

4.3 Repair of Exterior of Building. Having regard to the Landlord's obligations under section 5.2 of this Lease, the Tenant will have the obligation to maintain the exterior of the Building up to height of the commencement of the second floor, including general maintenance such as cleaning the windows and ensuring paint is in good condition, at its own cost.

4.4 Alterations. The Tenant will not make any alterations in the structure, plan or partitioning of the Building nor install any plumbing, piping, wiring, heating or cooling apparatus without the written consent of the Landlord, such consent not to be unreasonably withheld[.]

…

6.4 Fixtures. At the expiration of the Term, the ownership of all structures and improvements erected or placed upon the Premises and all fixtures in or about the Premises will vest in the Landlord and no compensation will be payable to the Tenant by the Landlord for the same; PROVIDED NEVERTHELESS that trade fixtures, with the sole exception of the bar, placed in the Premises by the Tenant may be removed by the Tenant during the term hereby created upon the condition that the Tenant give to the Landlord ten (10) days' advance notice specifying the fixtures to be removed; AND PROVIDED FURTHER that the Tenant will make good any and all damages to the Premises caused by such removal.

…

7.2 Tenant's Default. If at any time:

…

(b) the Tenant fails to perform or observe any other covenant or term of this Lease and such default shall continue for fifteen (15) days after notice thereof has been given by the Landlord to the Tenant; or

B. Notice under June 11 Letter

[246] The June 11 Letter sets out the following allegations:

1. You have failed to operate the business during normal business hours in contravention of section 3.1 of the Lease **["the Alleged 3.1 Default**"];

> 2. You have failed to maintain the Premises in a reasonable state of repair and maintain the patio at the rear of the Building in a neat and tidy condition in contravention of section 4.2 of the Lease **["the Alleged 4.2 Default"**];
>
> 3. You have failed to reasonably maintain the exterior of the Building in contravention of section 4.3 of the Lease **["the Alleged 4.3 Default**"];
>
> 4. You have made alterations to the Premises and the Building in connection with the installation of audio speakers without the Landlord's consent in contravention of section 4.4 of the Lease **["the Alleged 4.4 Default"**]; and
>
> 5. You have removed trade fixtures from the Premises without providing notice to the Landlord pursuant to section 6.4 of the Lease. Further, our client has advised us that you have removed fixtures from the Premises (for example light fixtures) which are the property of the Landlord under the Lease. **["the Alleged 6.4 Default"].**

C. Interpretation of the Lease

[247] A lease is a contract. In *Canaccord Genuity Corp. v. Reservoir Minerals Inc.*, 2019 BCCA 278, Justice Groberman, writing for the Court, provided a succinct summary of the basic principles of contractual interpretation:

> [19] The basic process for contractual interpretation was outlined by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53:
>
> > [47] … The overriding concern is to determine "the intent of the parties and the scope of their understanding". To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning….
> >
> > [48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement.…
> >
> > …
> >
> > [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement. The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The

> interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract. While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement.
>
> [Citations omitted.]

[20] The chambers judge recognized the principles of contractual interpretation, quoting, at para. 37 of his judgment, from *RBC Dominion Securities Inc. v. Crew Gold Corporation*, 2016 ONSC 5529, aff'd 2017 ONCA 648 at para. 52:

> (1) When interpreting a contract, the court aims to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said.
>
> (2) The court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective.
>
> (3) In interpreting the contract, the court may have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties.
>
> (4) The court should interpret the contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity.
>
> (5) If the court finds that the contract is ambiguous, it may then resort to extrinsic evidence to clear up the ambiguity.
>
> (6) While the factual matrix can be used to clarify the intention of the parties, it cannot be used to contradict that intention or create an ambiguity where one did not previously exist.

[248] I apply these principles in interpreting the Lease.

D. Whether Notice Sufficient

[249] CRAM claims that Olde Towne, without lawful right, and without effective notice to CRAM and an opportunity to cure, terminated the Lease and retook possession on June 27, 2018.

[250] As is made express in Olde Towne's counterclaim, Olde Towne relies on the June 11 Letter as notice of default under s. 7.2(b) of the Lease. Olde Towne asserts

that the June 11 Letter is sufficient and effective notice. In the event the Court finds the June 11 Letter lacking in the required particulars, Olde Towne relies on Mr. Usatch's oral comments provided during the June 12 Walkthrough as particulars of the alleged defaults. Olde Towne does not rely on the June 20 Letter as s. 7.2(b) notice. Rather, according to Olde Towne, the June 20 Letter was sent in response to the June 18 Email in order to ensure CRAM took the June 11 Letter seriously.

[251] I was not provided with any authorities addressing the degree of particularization required in a notice of default in respect of the specific listed covenants at issue under the June 11 Letter. The plaintiffs rely on the proposition that the law generally requires specificity in a notice of default. It relies on the recent Ontario Court of Appeal decision in *Art for Everyday Inc. v. Canarctic J.F.K. Inc*., 2022 ONCA 747, for the proposition that an insufficiently particularized notice of default does not trigger an event of default. In that case, the Court of Appeal wrote as follows with respect to a notice of default in payment of rent:

> [5] In a June 20, 2020 email, the landlord notified the tenant that the tenant was in default of payment of the rent owing under the lease but did not stipulate the precise amount it claimed was then owing for arrears and interest. To trigger an event of default under s. 13.1 of the lease, at a minimum, notice in writing from the landlord to the tenant must include at least those particulars and demand that the tenant pay the arrears within a stipulated period of no less than five days.
>
> [6] Because the landlord's June 20, 2020 email was the landlord's most recent notice of rent arrears to the tenant and did not include those requirements, we see no error in the application judge's conclusion that the landlord's July 14, 2020 notice of termination was invalid. If the landlord intended to rely on the tenant's then existing arrears to terminate the lease, the tenant was entitled to notice of the precise amount the landlord claimed was owing and that the landlord was demanding payment.
>
> [emphasis added]

[252] I accept that a notice of default must be sufficiently particularized in order to trigger an event of default for the purposes of a notice of termination of a lease. The purpose of the notice of default is to provide a meaningful opportunity to take action to cure whatever is said to breach the condition or covenant in issue, keeping in mind that the period of time permitted to cure a breach following notice will usually be limited and relatively brief. The degree of particularization required will vary with

the nature of the covenant or condition and the facts of the case and thus vary from case to case. What the tenant is entitled to in all cases, however, is fair notice of what is said to be wrong and what is said to be required to make it right. The termination of a lease is a serious consequence, and the fundamental purpose of the notice requirement and the notice period is to provide a meaningful opportunity to avoid that consequence.

[253] I note that issue in *Art for Everyday Inc*. was the amount of rent arrears required to be paid. Compared to other obligations, arrears of rent is a matter where it might conceivably be thought that the tenant might be obliged to keep and have recourse to its own records. Similarly, with arrears of rent, it might conceivably be argued that the tenant is fairly positioned to protect their position by overestimating and, at worst, ending up with a credit. Notwithstanding those arguments, rent is an area where the courts have insisted on precision in the notice provided. Comparably speaking, there are many other lease conditions and covenants where the tenant would be in no position to appreciate what action was necessary to safeguard their interest. In general, the more general and expansive the condition or covenant involved is, the more vital particulars are to enabling a notice to fulfil its function and purpose.

[254] Given the nature of the covenants at issue here, and the fact that the notice period is only 15 days, I find that the allegations of breach set out in the June 11 Letter are all insufficient to trigger an event of default for purposes of s. 7(2)(b) of the Lease.

[255] For the Alleged 4.2 and Alleged 4.3 Defaults, the notice merely identifies the covenants at issue and both covenants impose broad and general obligations. CRAM could either try to guess what faults were complained of (which risks guessing incorrectly) or try to addressing every potential fault it could conceive of (which remains risky, but is also expensive and extremely challenging to accomplish in a limited time period). CRAM was entitled to be notified of precisely what it was expected to correct.

[256] The Alleged 4.4 Default identifies the alleged wrong as having made an "alteration to the Building". It at least connects the complaint to the mounting of the Outdoor Speakers. Notwithstanding that connection, it is unclear as to what is said to be the "alteration" and what would be required to be done to cure the default.

[257] First, contrary to Mr. Usatch's testimony that the Outdoor Speakers were still up on June 26th, I accept Mr. Sparling's evidence that they had been taken down by then. After the Outdoor Speakers were taken down, Olde Towne appears to have adopted the position that there was a continuing default, but without saying so and without giving notice of what was required to cure it. (The January 21, 2023 Response to the Amended Claim does not list the continued presence of the Outdoor Speakers as an ongoing problem on June 26th or 27th. To the contrary, para. 38(k) asserts that as of June 27, 2018, the plaintiffs had not "filled in holes in front of the building where Cram had unlawfully installed outdoor speakers".) The June 11 Letter left it for CRAM to try to guess at the alleged default and guess what was required to cure it.

[258] Similarly, under the Alleged 6.4 Default, CRAM was left to guess what Olde Towne considered to be a fixture, guess what Olde Towne considered to be a trade fixture, and guess what items Olde Towne believed to have been removed.

[259] Finally, I find that the Alleged 3.1 Default is also unduly vague. The default identified is "failing to operate the business during normal business hours in contravention of section 3.1". The impacts of the ambiguity in the demand for compliance are demonstrated by the fact that CRAM attempted to appease Olde Towne by re-opening under the Lunch Concept. Olde Towne then took the position that the Lunch Concept was non-compliant with s. 3.1. Not until its June 20 Letter did Olde Towne begin to articulate what it considered required to comply with s. 3.1.

[260] There is no need, on the facts here, to determine how precise of a notice might be required in circumstances where it could plausibly be asserted that a defect or default should be self-evident. The testimony of Mr. Sparling, Mr. Khaneja, Ms. Danzinger and Mr. Caulder, along with a review of the Photos, satisfies me that this is not a case where that could be plausibly asserted.

[261] I conclude that the June 11 Letter was not sufficiently particularized to effectively trigger an event of default to support the Notice of Termination.

[262] Olde Towne argues that if further particularization of the June 11 Letter was needed, it was provided by Mr. Usatch during the June 12 Walkthrough. The parties did not provide any authorities dealing with a written notice and oral particulars. Assuming (without deciding) that it would accord with the Lease to provide oral particulars, I find that the June 12 Walkthrough did not, in fact, provide such particulars.

[263] I accept Mr. Sparling's testimony that the tenor of the discussion during the June 12 Walkthrough was conversational, as opposed to directive. For example, while Mr. Usatch was displeased by the graffiti wall, I find that following the discussion of it as a design element and of the fact that it had been since inception of the restaurant, Mr. Usatch did not direct that CRAM must remove it. If a clear demand had been made, I am satisfied that Mr. Sparling would have noted it. Similarly, I accept Mr. Sparling's testimony that Mr. Usatch indicated displeasure about the Back Patio being used for storage, but find that Mr. Usatch did not state that the Lease prohibited that use nor demand that something specific be done in order to comply with the Lease. Again, I am satisfied that had that occurred, Mr. Sparling would have taken note. Instead, in the June 18 Email, Mr. Sparling specifically asked Mr. Usatch to explain any objections he had about the Back Patio.

[264] I also note that the June 20 Letter does not state that the issues it lists were already specifically raised to CRAM's attention during the June 12 Walkthrough. In the circumstances, if that were the case, one would expect that to be said expressly. To the contrary, the June 20 Letter presents the listed issues as fresh concerns – including the issue about proof of insurance.

[265] In summary, the June 11 Letter was not sufficient to effectively to trigger an event of default to support termination of the Lease under any of the sections identified therein. Further, the June 12 Walkthrough cannot prop up the deficiencies in the notice given under the June 11 Letter.

E. Findings on Alleged Defaults

[266] Much of the evidence that CRAM relies on in support of its claims for punitive damages deals with the merits of the allegations of default. As factual findings are required to be made for the purposes of punitive damages in any event, I will also make alternative findings (i.e., notwithstanding my conclusion that the June 11 Letter was deficient notice).

Alleged 4.2 Default: Failure to Repair

[267] Olde Towne never provided CRAM with notice of defects under s. 4.2 of the Lease. Under s. 4.2, CRAM covenanted to repair defects within 10 days of notice of defect. It is a failure to repair the defect *within 10 days of notice of defect* that constitutes a breach of s. 4.2, and thus the grounds for a notice under s. 7.2(b). The plain and ordinary language of the Lease requires both notice of defect and notice of default to be given and requires both notice periods to run and expire, consecutively, before termination can undertaken for default under s. 4.2. Olde Towne advanced no competing construction of the Lease that would provide for a single notice or for the two notice periods to run concurrently.

[268] The defendants object that the interaction between s. 4.2 and 7.2(b) raised an issue outside of the pleadings. I disagree. The question is squarely raised by CRAM's plea that it did not receive proper notice under s. 7.2(b), and Olde Towne's plea that CRAM was in default of the Lease due to its breach of s. 4.2.

[269] In any event, I am not satisfied that there was failure to repair. The defendants' evidence as to the condition of the Premises is so exaggerated as to be generally unworthy of belief. The chasm between Mr. Usatch's testimony and what can be plainly seen in the June 8 and June 22 Photos is vast.

[270] The Photos show the Front Patio is generally in good condition. The planter boxes in the Photos look fine. There is no more litter than one would expect alongside any public sidewalk in the downtown area. The condition of the pavers

beneath the Front Patio is not only unremarkable, but equivalent to those in front of the Residential Entryway and those under Ferris' Grill & Garden Patio's patio.

[271] I do not accept Mr. Usatch's testimony that the kitchen hood was observed to be dripping with grease. Mr. Sparling, who has demonstrated a good recall of the walkthrough, does not recall going into the kitchen area, let alone a dramatic find having been made there. Further, Mr. Usatch took a video of the washrooms. It stands to reason that if anything else as dramatic as he describes was seen, he would have documented that as well. I also accept Mr. Khaneja's evidence that the kitchen hood fan was rarely used as the menu centred on its separate pizza oven.

[272] On Ms. Weir's testimony, there may have been as few as 25 flies out on the Back Patio. That is unremarkable given that the Back Patio is beside a large tree, backs out to an open greenway, and has 536's garbage and recycling containers off to the side. While no authorities were provided for guidance as to what is required by the Lease standard of "neat and tidy", in my view, the state of the Back Patio is unremarkable. Certainly, the Back Patio in the June 22 Photos *is* neat and tidy in comparison to its state under the succeeding tenant, as shown in the 2019 Photos and testified to by Mr. Craggs.

[273] That brings me to Mr. Usatch's video of the washrooms. The graffiti in the washrooms was explained by Mr. Sparling as a design element. On cross-examination, Mr. Usatch conceded that it was possible that it was a design element, and also agreed that design elements are common in restaurants and lounges. I am satisfied that it is, in fact, a design element. Admittedly, it is not a design element that would be to everyone's taste, but as design element, it was neither a defect under the Lease nor condonation of vandalism.

[274] The video does supports Mr. Usatch's point that the washrooms (graffiti wall aside) needed painting. There were areas of the drywall in the washrooms that needed repair and areas where the graffiti had escaped the boundary of the graffiti walls proper. Mr. Caulder was of the view that the washrooms could use new paint.

[275] However, covenants to repair and maintain do not impose obligations of perfection on a tenant, as recently noted in *SCP 173 Dining Limited v. Costa Del Sol Holdings Ltd*., 2021 BCSC 1252 at 77–78:

> [77] *O'Connor v. Fleck*, 2000 BCSC 1147 addresses a tenant's covenant to repair. The law does not hold a tenant who has entered into such a covenant to a standard of perfection. Unless the lease is explicit, the tenant is not required to improve the premises, nor to eliminate any signs of age. The covenant to repair requires a tenant to put the building into a state of repair similar to that existing when the tenancy began: *O'Connor* at para. 48. The obligations to repair during the term of the lease and to leave the premises in good repair at the end of the lease are both qualified by the reasonable wear and tear exception: *O'Connor* at para. 56; *Freshslice Properties Ltd. v R.T.M. Holdings Ltd.*, 2013 BCSC 135 at para. 109.
>
> [78] In addition, a covenant to "maintain" refers to maintenance after the date of the demise and not to repairs indicated before that date. An obligation to put and keep premises in better condition than they were at the beginning of the term must be expressed in plain words. In the absence of such an express provision, the tenant is simply obliged to maintain, through repairs, the building as it existed at the commencement of the lease: *G.M. Pace Enterprises Inc. v. Tsai*, 2003 BCSC 1336 at paras. 74-77.

[276] Further, CRAM had ceased actively operating the restaurant and was developing a new use for the space that would have necessitated, at a minimum, light renovations prior to any re-opening to the public. I accept that some level of renovation would have been undertaken but for Olde Towne's assertion that not being open to public was a breach of s. 3.1 and that CRAM did not have a right to close for renovations.

Alleged 4.3 Default: Failure to Maintain Exterior Paint

[277] I find that Mr. Usatch did agree, at the time of the June 12 Walkthrough, that the exterior paint was satisfactory. This is consistent with the fact that the exterior paint was not listed in the June 20 Letter. It is also consistent with the fact that the June 20 Letter, which is otherwise very directly responsive to the June 18 Email, does not deny Mr. Sparling's assertion that he so agreed. It is also consistent with Mr. Usatch's inability to identify any flaws in the exterior paint in the Photos. I also reject Ms. Weir's testimony that she observed "missing" paint on window "ledges". In

addition to my already expressed reservations, her testimony on the point was extremely vague.

Alleged 4.4 Default: Outdoor Speakers

[278] CRAM took the Outdoor Speakers down prior to June 26. Olde Towne's case for continuing default at the time of termination rests on an assertion that screw holes were left in the wood façade after removal, and that these holes, in and of themselves, amounted to an "alteration in the structure … of the Building". No other "alteration" was established by evidence.

[279] The defendants read s. 4.4 as prohibiting "alterations to the building", and thus prohibiting any change that alters any part of the building to any degree (i.e., attaching speakers, making screw holes). However, s. 4.4 reads: "alterations in the structure, plan or partitioning of the Building". Reading it in context with the remainder of the provision, which states: "nor install any plumbing, piping, wiring, heating or cooling apparatus", the alterations envisioned by s. 4.4 speak to changes in the way in which the building is arranged or organized (thus the reference to the plan of the building and to partitioning the building). The word "structure" in s. 4.4 does not refer to the building *qua* structure, but rather is directed at *structural* change. If the opening of the provision did prohibit any change of any sort to the building, then the latter clause specifically addressing installation would be unnecessary.

[280] I note that passing reference was made to the possibility that the Outside Speakers were "wired" (as opposed to "wireless"). However, the evidence did not establish that any wiring was installed in relation to the Outdoor Speakers, let alone how it was addressed or redressed in taking the speakers down.

Alleged 6.4 Default: Removal of Fixtures and Trade Fixtures

[281] I am satisfied that Mr. Usatch did agree at the June 12 Walkthrough that there were no fixtures missing. In addition to being consistent with the June 20 Letter for the reasons set out above regarding the exterior paint, this is consistent with Mr.

Usatch's inability to identify any specific trade fixture or fixture as missing in his trial testimony. His testimony amounted to a vague assertion that he thought it "looked like" such a thing might have happened.

Alleged 3.1 Default: The Closure

[282] I found the Alleged 3.1 Default to be deficient notice because Olde Towne did not tell CRAM what, in Olde Towne's view, compliance with s. 3.1 entailed. To deal with the alleged default, I must construe s. 3.1 and determine what was actually required.

[283] Again, s. 3.1 reads:

> 3.1 Business. The Tenant will conduct or cause to be conducted on the Premises the business of a food primary licensed restaurant or lounge or food primary licensed bar and no other business without the express written consent of the Landlord, such consent not to be unreasonably withheld. **["Use Condition"]** The Tenant will conduct its business on the Premises during normal business hours for like businesses in the community. **["Hours Condition"].**

[284] Olde Towne says the Hours Condition is a contractual obligation to continuously and actively conduct a restaurant/lounge business in the Premises during whatever are "normal business hours" for similar businesses. Olde Towne asserts that CRAM was in default of that obligation from May 26 through June 26, 2018. It says the default was not cured by the June 22 re-opening because the Lunch Concept was a "sham" business. (I take the "sham" allegation to be an assertion that it is somehow improper to operate a business for the sole purpose of complying s. 3.1.)

[285] CRAM says that the Hours Condition is too vague and ambiguous to be an enforceable obligation of any kind.

[286] Further, CRAM submits that even if s. 3.1 can be read as obliging CRAM to actively operate a business in the Premises, it cannot reasonably be read as prohibiting CRAM from temporarily closing for legitimate business reasons common in the restaurant industry (e.g., renovations, change in concept, change in menu), as that is what "like businesses in the community" do.

[287] Finally, CRAM argues that even if Olde Towne's interpretation of the Hours Condition is accepted, "like businesses" must be understood to mean restaurants and lounges that are "alike" to CRAM's business in terms of targeted clientele, as the vast variety among restaurant businesses (e.g., fine dining, breakfast/brunch, 24-hour diner) makes a broad "normal hours" concept unworkable. On this basis, CRAM says the "like businesses" grouping for the Lunch Concept would be other downtown restaurants directed at office-worker lunch and afternoon clientele.

[288] The Offer to Lease said nothing about business hours. Olde Towne's June 3 Proposal introduced the following:

> 3.1 Business. The Tenant will conduct or cause to be conducted on the Premises the business of a restaurant and no other business without the express written consent of the Landlord, such consent not to be unreasonably withheld. The Tenant will conduct its business on the Premises during normal business hours for like businesses in the community.

[289] The Hours Condition in the Lease is the same as in Olde Towne's June 3 Proposal, although the Use Condition was subject to further changes.

[290] Mr. Khaneja testified that it was very important to CRAM to get the broader Use Condition language that was ultimately agreed upon. He testified that CRAM was concerned about its ability to pivot to another concept if the "Brooklyn pizzeria" idea did not take off. Mr. Khaneja testified that the Hours Condition, on the other hand, was simply accepted as set out in the June 3 Proposal without any discussions between the parties as to its meaning or effect.

[291] On Olde Towne's reading of s. 3.1, CRAM cannot close its business in the Premises, even temporarily for business purposes, and CRAM's business in the Premises is required to be open to the public during whatever hours amount to "normal business hours" for like businesses in the community.

[292] An obligation to be open to the public for business without interruption is a momentous intrusion on management power and discretion. An obligation to be open to the public for mandated service hours is also a significant intrusion on management power respecting the operation of the business. One would expect

terms imposing either – let alone both – of these obligations to be express and detailed. One would expect such a mandatory obligation to be express (e.g., “continuously”, “without interruption” “every day but New Year Day”) and that what is required to comply to be set out in detail (e.g., “the tenant must be open for retail customers of the mall during all established hours of mall operation”). The wording of the Hours Condition is an unlikely articulation of such an obligation.

[293] It would also be incongruous to construe the Hours Condition as requiring uninterrupted operation of a restaurant given the circumstances of the negotiation. The Lease was negotiated when the Premises were an empty shell and it was clear that there would be no operating or licensed business for quite some time. It is also improbable to suppose that the parties anticipated that whatever restaurant or lounge CRAM opened in the Premises would operate without interruption for the entire 15 years of the Lease (including renewals). On the evidence before me about restaurants in Victoria, I accept that it is not uncommon to close for renovations and similar business-related reasons in order to maintain operations in the restaurant business. I also note that the Use Condition contemplates that CRAM can (with consent) change to an entirely different kind of business, which would seem to necessarily involve a closure to effect the changeover.

[294] Further, the Hours Condition is not set out in the section dealing with the tenant’s covenants. Rather, it is found alongside the Use Condition as part of a provision that describes the type of business permitted.

[295] Given the above, Olde Towne’s proposed interpretation cannot be accepted. In my view, the proper construction of the Hours Condition is that it, along with its companion Use Condition, speak to the nature of what is permitted by the Lease. So read, the Hours Condition does not impose any positive obligations on CRAM, but rather enables Olde Towne to object in the event CRAM conducts business on the Premises outside what are normal hours for like businesses in the community. For example, although CRAM could open a bar under the Use Condition, the Hours

Condition might allow Olde Towne to object to the bar opening too early in the day in comparison to like businesses in the community.

[296] Accordingly, the fact that Famous Original closed on May 26 was not a breach of s. 3.1. Accordingly, there was no breach to cure, making the effect of re-opening under the Lunch Concept irrelevant.

Summary of Findings on Alleged Defaults

[297] Even if the June 11 Letter provided sufficient notice of the defaults alleged, the alleged defaults have not been established on the evidence. CRAM has established that the Lease was unlawfully terminated and Olde Towne's Counter Claim is therefore dismissed.

[298] I will nonetheless address CRAM's allegation that Olde Towne breached the duty of good faith and honesty with respect to its discharge of contractual obligations under the Lease on the basis that it is relevant for punitive damages.

F. Contractual Duty of Honest Performance

[299] CRAM relies on the principles in *Bhasin v. Hrynew*, 2014 SCC 71 regarding the duty of honest performance which, as explained in *Bhasin* and subsequent judgments, requires that a party must not lie or otherwise knowingly mislead the other about matters directly linked to the performance of the contract.

[300] An overview of these principles was recently set out by Justice Veenstra in *Real Organics & Naturals House Ltd. v. Canadian Phytopharmaceuticals Corporation*, 2024 BCSC 1303 [*Real Organics*]:

> [269] The court may also consider, in appropriate cases, contractual duties arising from the organizing principle of good faith. In [*C.M. Callow Inc. v. Zollinger*, 2020 SCC 45] *Callow*, the Court confirmed principles previously recognized in *Bhasin*, including a duty of honest performance that applies to all contracts and requires that parties must not lie or otherwise knowingly mislead each other about matters directly related to the performance of a contract. As explained in *Callow* at paras. 50-51:
>
> > [50] The duty of honest performance is a contract law doctrine, setting it apart from other areas of the law that address the legal consequences of deceit with which it may share certain similarities. One could imagine analyzing the facts giving rise to a duty of honest

> performance claim through the lens of other existing legal doctrines, such as fraudulent misrepresentation giving rise to rescission of the contract or the tort of civil fraud (see, e.g., B. MacDougall, *Misrepresentation* (2016), at §§1.144-1.145). However, in *Bhasin*, Cromwell J. wrote explicitly that while the duty of honest performance has similarities with civil fraud and estoppel "it is not subsumed by them" (para. 88). For instance, unlike estoppel and civil fraud, the duty of honest performance does not require a defendant to intend that the plaintiff rely on their representation or false statement. Cromwell J. explicitly defined the duty as a new and distinct doctrine of contract law, not giving rise to tort liability or tort damages but rather resulting in a breach of contract when violated (paras. 72-74, 90, 93 and 103). We are not asked by the parties to depart from this approach.
>
> [51] In light of *Bhasin*, then, how is the duty of honest performance appropriately limited? The breach must be directly linked to the performance of the contract. Cromwell J. observed a contractual breach because Can-Am "acted dishonestly toward Bhasin in exercising the non-renewal clause" (para. 94). He pointed, in particular, to the trial judge's conclusion that Can-Am "acted dishonestly with Mr. Bhasin throughout the period leading up to its exercise of the non-renewal clause" (para. 98; see also para. 103). Accordingly, it is a link to the performance of obligations under a contract, or to the exercise of rights set forth therein, that controls the scope of the duty. …

[270] The Court in Callow also considered the nature of conduct that would amount to dishonesty for purposes of this duty. As noted at paras. 77, 81 and 83:

> [77] There is common ground that parties to a contract cannot outright lie or tell half-truths in a manner that knowingly misleads a counterparty. It is also agreed here that the failure to disclose a material fact, without more, would not be contrary to the standard. Beyond this, however, the parties continue to disagree about what might constitute knowingly misleading conduct as that idea was alluded to in *Bhasin*.
>
> …
>
> [81] One might well understand that courts would shy away from imposing a free-standing positive duty to disclose information to a counterparty where it would serve to upset the corrective justice orientation of contract law. Whether or not a positive duty to cooperate of this character should be associated with the principle of good faith performance in the common law, a party to a contract has no general duty to subordinate their interests to that of the other party in the law as it now stands (see *Bhasin*, at para. 86). Requiring a party to speak up in service of the requirements of good faith where nothing in the parties' contractual relationship brings a duty to do so could be understood to confer an unbargained-for benefit on the other that would stand outside the usual compass of contractual justice. Yet where the failure to speak out amounts to active dishonesty in a

> manner directly related to the performance of the contract, a wrong has been committed and correcting it does not serve to confer a benefit on the party who has been wronged. To this end, Cromwell J. clarified that the "situation is quite different . . . when it comes to actively misleading or deceiving the other contracting party in relation to performance of the contract" (para. 87). In such circumstances, contractual parties should be mindful to correct misapprehensions, lest a contractual breach of the *Bhasin* duty be found.
>
> …
>
> [83] This emphasis on the corrective justice foundation of the duty to act honestly in performance is, in my view, helpful to understanding why a facially unfettered right is nonetheless constrained by the imperative requirement of good faith explained in *Bhasin*. I recall that Cromwell J. sought to reassure those who feared commercial uncertainty resulting from the recognition of this new duty by explaining that the requirement of honest performance "interferes very little with freedom of contract" (para. 76). After all, the expectation that a contract would be performed without lies or deception can already be thought of as a minimum standard that is part of the bargain. I agree with the sentiment expressed by the Chief Justice of Alberta in a case that relied on *Bhasin* and *Potter*: "Companies are entitled to expect that the parties with whom they contract will be honest" in their contractual dealings (*IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing*, 2017 ABCA 157, 53 Alta. L.R. (6th) 96, at para.4). In that sense, while the duty is one of mandatory law, in most cases it can be thought of as leaving the agreement and both parties' expectations — the first source of justice between the parties — in place. By extension, requiring that a party exercise a right under the contract in keeping with this minimum standard only precludes the commission of a wrong and thus repairing that breach, where damage resulted, may be thought of as consonant with the principles of corrective justice. Where a party has lied or otherwise knowingly misled the other contracting party in respect of a matter that is directly linked to the performance of the contract, it amounts to breach of contract that must be set right, but the benefits of the bargain need not be otherwise reallocated between the parties involved.
>
> [emphasis added]

[301] Overall, I am satisfied that Mr. Usatch's inspections in the June 12 and June 26 Walkthroughs cannot be considered to have been undertaken in good faith. I reach this conclusion based on the following in particular:

a) the extent of Mr. Usatch's exaggerated testimony in the face of what can be seen in the June 8 and June 22 Photos;

b) Mr. Usatch's concerted effort to identify faults of any kind at all in reviewing the Photos in Court;

c) Mr. Craggs' testimony about the condition of the wood and windows at the front of 536 in 2018;

d) Mr. Craggs' testimony about (and the 2019 Photos showing), the tolerated state of Back Patio under the succeeding tenant; and

e) the evidence of Mr. Usatch's animosity towards CRAM, as demonstrated in the First Thread and his comments to Ms. Dilan.

[302] I also find that Mr. Usatch was aware of the Outdoor Speakers from shortly after they were put up in mid-2017. They are plainly there to be seen and heard, especially given the proximity to the Residential Entrance and given Mr. Usatch's testimony that he went in and out the Residential Entrance several times almost every day. I find that Mr. Usatch subsequently seized upon the speakers as an issue when he wanted to terminate the Lease.

[303] That conclusion is also supported by my finding that Mr. Usatch agreed during the June 12 Walkthrough that the exterior paint was satisfactory and that no fixtures were missing, but subsequently resurrected those complaints.

[304] The Court is driven to conclude that the defendants' conduct from at least May 26, 2018 onward was directed at ending the Lease, perhaps initially by giving CRAM additional motivation to just walk away, but eventually by engineering a state default in order to justify terminating the Lease. As rather candidly observed by Mr. Ustach in his June 12, 2018 email, Olde Towne was working "to *end* the current lease" (emphasis added).

[305] I am satisfied Olde Towne also breached the contractual duty of honest performance by its conduct in relation to its giving notice of default under the Lease and issuing the Notice of Termination.

XI. TORT CLAIMS

A. Inducing a Breach of Contract

[306] In *Super-Save Enterprises Ltd. v. Del's Propane Ltd*., 2004 BCCA 183 at para. 2, Lambert J.A. set out the elements of the tort of inducing breach of contract:

> To establish liability for the tort of inducing breach of contract the plaintiff must prove all of the following elements:
>
> a) the existence of a contract;
>
> b) the defendant was or can be assumed to have been aware of the existence of the contract;
>
> c) the defendant intended to cause the breach; and
>
> d) the defendant caused or induced a breach; and
>
> e) the plaintiff suffered damage as a result.

[307] CRAM asserts that the outcome of the Parkside Meeting was a concluded oral contract, variously describing it at times in submissions as a share purchase agreement, partnership agreement or contractual joint venture. In this respect, CRAM relies on the testimony of Mr. Khaneja, Mr. Sparling and Mr. Craggs regarding the Parkside Meeting and on the content of the Draft LOI.

[308] Olde Towne says the evidence does not establish the existence of an enforceable agreement.

[309] In S.M. Waddams, *The Law of Contracts*, 7th ed. (Toronto: Thomson Reuters, 2017) at 46–47 and 52–53, the author discusses open terms and incomplete agreements. Addressing contract formation and incomplete agreements, the author states:

> It is often said that there can be no "agreement to agree". As Lord Wright pointed out in *Hillas & Co. Ltd. v. Arcos Ltd*. an agreement to agree may mean one of two things:
>
> > A contract *de praesenti* to enter into what, in law, is an enforceable contract, is simply that enforceable contract, and no more or no less; and if what may not very accurately be called the second contract is not to take effect till some future date but is otherwise an enforceable contract, the position is as in the preceding illustration, save that the operation of the contract is postponed. But in each case there is *eo instanti* a complete obligation. If, however, what is meant is that the parties agree to negotiate in the hope of effecting a valid contract, the

> position is different There is then no bargain except to negotiate, and negotiations may be fruitless and end without any contract ensuing yet even then, in strict theory there is a contract (if there is good consideration) to negotiate, though in the event of repudiation by one party the damages may be nominal, unless a jury think that the opportunity to negotiate was of some appreciable value to the injured party.
>
> Lord Wright's last sentence appears to contemplate in some circumstances, the possibility of substantial damages for breach of a contract to negotiate. …
>
> Against this is the argument, which prevailed in the House of Lords in *Walford v. Miles*, and has been followed in some Canadian cases, that an agreement to negotiate is too uncertain and that enforcement of such an agreement would be inconsistent with the right of the defendant to act from self-interest when putting an end to negotiations.
>
> …
>
> ... Is execution of the formal contract a step in carrying out an already enforceable agreement, like a conveyance under an agreement to buy land, or is it a prerequisite of any enforceable agreement at all? Again, the test must be the reasonableness of the parties' expectations. Has the promisor committed himself to a firm agreement or does he retain an element of discretion whether or not to execute the formal agreement? In the former case there is an enforceable agreement. In the latter there is none. If the promisee's expectation of a firm commitment is a reasonable one it will be protected even though the formal document is never executed. …
>
> [emphasis added]

[310] Sections 11 and 13 of the Draft LOI read:

> 11. The parties agree immediately following the execution of this letter of intent to proceed promptly to negotiate in good faith a definitive purchase agreement (the purchase agreement in defined terms) and will use reasonable efforts to execute the purchase agreement within 30 days following the execution of this letter of intent. […]
>
> 13. This Letter of Intent is intended to be **non-binding**, and until a final share purchase agreement is executed by us, there will be no binding legal obligations between us with the exceptions of this paragraph and paragraphs 14 [confidentiality], 15 [refrain from parallel competing negotiations] and 16 [each to pay own costs] below. Although this Letter of Intent sets out the basic understandings reached between us to date, the actual documentation may well be the subject of further negotiation and contain matters not touched upon by this letter as we mutually pursue in good faith the transaction we both desire.
>
> [bold in original]

[311] The Draft LOI expressly provides that there are no binding legal obligations between the parties aside from those listed in s. 13. Notably, s. 11 – the agreement to negotiate – is *not* among those listed in s. 13. Thus, there is not even a binding agreement to negotiate in good faith. The terms listed as binding under s. 13 all govern the bargaining process that would result if the parties did exercise their discretion in favour of engaging in bargaining (which they did not).There was no enforceable contract.

[312] I find that the Draft LOI does correctly reflect the witnesses' testimony about the Parkside Meeting. The attendees did agree: they agreed that certain propositions were sufficiently acceptable to both sides to warrant entering into contract negotiations. There was great optimism all around for the negotiations. But there was no binding contract.

[313] As the tort cannot be established absent proof of the existence of a contract, I need not consider the remaining elements in any detail. I do find, however, that CRAM's evidence that the defendants had, or should be taken to have had, knowledge of the existence of a contract did not rise above speculation.

B. Unlawful Means Tort

[314] CRAM asserts that the defendants threatened Tiverton in the telephone call described by Mr. Ferris in the First Thread and then again in person during the Perro Negro Meeting. CRAM alleges that those threats caused Tiverton to decline to participate in negotiations in keeping with the Draft LOI and with the Parkside Meeting discussions.

[315] An overview of the tort is found in *Latifi v. The TDL Group Corp*., 2024 BCSC 832:

> [46] The unlawful means tort is available in three-party situations in which the defendant commits an unlawful act against a third party and that act intentionally causes economic harm to the claimant. The gist of the tort is the targeting of the plaintiff by the defendant through the instrumentality of unlawful acts against a third party: *A.I. Enterprises Ltd. v. Bram Enterprises Ltd*., 2014 SCC 12 [*A.I. Enterprises*] at paras. 78, 96–97.
>
> [47] The essential elements of this tort are:

> a) an unlawful act committed against a third party;
>
> b) the act was intended to cause economic harm to the claimant; and
>
> c) it resulted in economic harm to the claimant.
>
> (*Low v. Pfizer Canada Inc*., 2015 BCCA 506 at paras. 77, 80, 82; *A.I. Enterprises* at paras. 23, 26, 29, and 45.)
>
> [48] Acts are "unlawful" if they would support a civil action for damages or compensation by the third party, or they would have supported an action had the third party suffered a loss: *A.I. Enterprises* at para. 74. In other words, there must be an actionable civil wrong of some kind against a third party other than the claimant.
>
> [49] With respect to the requirement of the intention to cause harm, something more than mere foreseeability of the harm is required: *A.I. Enterprises* at para. 97. The core levels of intention that are sufficient to meet the requirement of the unlawful means torts are: (a) an intention to cause economic harm to the claimant as an end in itself; or (b) an intention to cause economic harm to the claimant because it is a necessary means of achieving an end that serves some ulterior motive: *A.I. Enterprises* at para. 95. These types of intentions involve a tortfeasor "aiming at" or "targeting" the plaintiff.
>
> [50] It is not sufficient that the harm to the plaintiff be an incidental consequence of the defendant's conduct, even where the defendant knows that it is extremely likely that harm to the plaintiff may result: *A.I. Enterprises* at para. 95. Such incidental economic harm is an accepted part of market competition.
>
> [emphasis added]

[316] I find, based on the First Thread, that Mr. Usatch did threaten the prospect of a very unfavourable renewal negotiations if Tiverton worked with CRAM in relation to the Premises. I also accept Mr. Craggs' testimony regarding Mr. Usatch's communications at the Perro Negro Meeting. Mr. Craggs' testimony as to what was said at the Perro Negro Meeting, and the serious manner in which it was stated, are supported by Mr. Usatch's statements to Ms. Dilan regarding his conversation with "Tom and Dave". I will refer to Mr. Usatch's telephone statement to Mr. Ferris and his statements at the Perro Negro Meeting as the "Threats".

[317] I find that the Threats were made in order to interfere with CRAM's efforts to develop a profitable use for the Premises. I am satisfied that Mr. Usatch made the Threats to facilitate bringing about an end the Lease, either by enabling him to terminating the Lease on the basis that no restaurant was operating or by inspiring CRAM to walk away. As a direct result of the Threats, Tiverton withdrew from

negotiations further to the Parkside Meeting rather than impair its own landlord-tenant relationship with Olde Towne.

[318] However, I conclude that CRAM has not established that the Threats were "unlawful" for purposes of the unlawful means tort.

[319] CRAM contends that the Threats were actionable by Tiverton against Olde Towne, either as the tort of intimidation or as a breach of a duty of honesty and good faith owed in relation to the discharge of contractual obligations under the Tiverton-Olde Towne lease.

[320] As noted in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd*., 2014 SCC 12 at paras. 65–67, the tort of intimidation has its own unlawful means requirement. A recent review of the elements of intimidation and the unlawful act requirement for the tort is found in *Weisenburger v. College of Naturopathic Physicians of British Columbia*, 2024 BCSC 1047:

> [96] *Central Canada Potash Co. Ltd. et al. v. Government of Saskatchewan*, 1978 CanLII 21 (SCC), [1979] 1 SCR 42 at 81 describes the tort of intimidation:
>
> > A commits a tort if he delivers a threat to B that he will commit an act or use means unlawful as against B, as a result of which B does or refrains from doing some act which he is entitled to do, thereby causing damage either to himself or to C. The tort is one of intention and the plaintiff, whether it be B or C, must be a person whom A intended to injure.
>
> [97] The essential elements of the tort of intimidation are thus:
>
> a) the defendant threatens unlawful acts in order to coerce the plaintiff into doing or not doing certain acts;
>
> b) the defendant intends that the plaintiff will suffer injury as a result;
>
> c) the plaintiff submits to the threat by doing or not doing certain acts; and
>
> d) as a result, the plaintiff suffers actual damage.
>
> [98] With respect to the first element, the essence of the tort of intimidation is the threat of an unlawful act: Philip H Osborne, *The Law of Torts*, 6th ed (Toronto: Irwin Law, 2020) at 349; Lewis N Klar & Cameron SG Jefferies, *Tort Law*, 6th ed (Toronto: Thomson Reuters, 2017) at 832. As indicated by the first requirement, the tort of intimidation does not arise where a defendant has followed a course of action that they believe to be lawful: *Sauvé v. Canada*, 2011 FC 1074 at para. 44, aff'd 2012 FCA 280; *White Hatter Limousine*

> *Service Ltd. v. Calgary (City)*, 1993 CanLII 7182 (AB KB), [1994] 1 WWR 620 (Alt KB) at para. 28. For example, the tort of intimidation is not made out where "a party to a contract asserts what he reasonably considers to be his contractual right": *Central Canada Potash* at 87. ...

[321] In my view, the evidence does not establish that the Threats were threats to do anything unlawful. A threat to bargain hard in one's own self-interest is not unlawful. A threat to insist that lease renewal requirements be strictly met is not unlawful. A threat to begin insisting on strict compliance with tenant covenants is not unlawful. In short, Mr. Usatch's observation to Ms. Dilan was correct – there are any number of ways to make a landlord-tenant relationship more or less unpleasant depending on the landlord's attitude. Mr. Usatch said he could make things hard. He did not need to break the law to do that.

[322] The Tiverton-Olde Towne lease is not in evidence. While Mr. Craggs and Mr. Usatch both testified that it contains renewal terms, the contract is not before me for consideration. In any event, the answer is the same as above: one can be demanding and difficult without necessarily breaching any contractual obligations. Mr. Usatch did not threaten to breach the Tiverton lease; he threatened to make negotiations difficult and unfriendly. It was well within his power to do that lawfully.

XII. DEFAMATION

A. Legal Framework

[323] The defamation plea is one of slander (oral utterance). There is also an allegation of malice. The response to civil claim asserts that the statements set out in the claim are all either true (statements of fact) or fair comment (statements of opinion).

[324] The law of defamation protects a person's reputation from defamatory falsehoods. A publication is considered defamatory if it has the tendency to lower the plaintiff's reputation in the estimation of reasonable persons in the community. In *Weaver v. Corcoran*, 2017 BCCA 160, the Court of Appeal articulated the function of the law of defamation:

> [62] The function of defamation law is to protect and vindicate reputation from harm that is unjustified. A good reputation fosters one's sense of self-worth

> and, as an aspect of personality, is related to the innate worthiness and dignity of the individual, an underlying value of the Canadian Charter of Rights and Freedoms. Once tarnished, good repute is hard to regain, with sometimes devastating consequences, particularly in a professional context. However, its protection must be balanced and reconciled with the Charter guarantee of freedom of expression, a recognised pillar of modern democracy: [Hill v.] Church of Scientology [of Toronto, [1995] 2 S.C.R. 1130] at paras. 100-121; WIC Radio [Ltd. v. Simpson, 2008 SCC 40] at paras. 2, 15; Bou Malhab [v. Diffusion Métromédia CMR inc., 2011 SCC 9] at paras. 16-18; Botiuk v. Toronto Free Press Publications Ltd., [1995] 3 S.C.R. 3 at paras. 91-92.

[325] *Weaver* also identifies the essential issues for determination:

> [66] Two essential issues must be determined in a defamation action. The first is a threshold question: are the words complained of reasonably capable of bearing a defamatory meaning? This is a question of law subject to appellate review on a standard of correctness. If this threshold is met, the second question arises: do the words bear the defamatory meaning pleaded? This is a question of fact to be reviewed on a standard of reasonableness: *Lawson* at paras. 11-12.
>
> [67] The threshold question requires assessment of the range of possible meanings that words could reasonably bear and sets the outer limits of potential liability. In an action tried by a judge alone, it need not be asked and answered separately. As the trier of fact, the judge's function is to determine definitively whether the impugned words did, in fact, have a defamatory meaning. The threshold question is subsumed by this inquiry: *Mainstream Canada* at para. 15.
>
> [68] Words that tend to lower the plaintiff's reputation in the eyes of a reasonable person are defamatory: *Grant v. Torstar Corp.*, 2009 SCC 61 (S.C.C.) at para. 28. For example, allegations of dishonourable or dishonest conduct in an individual's professional life will typically meet this definition: *Botiuk* at paras. 69, 92. The central question is whether the meaning conveyed by the impugned words genuinely threatened the plaintiff's actual reputation: *Vander Zalm v. Times Publishers* (1980), 109 D.L.R. (3d) 531 (B.C. C.A.) at 535; *Dinyer-Fraser v. Laurentian Bank of Canada*, 2005 BCSC 225 (B.C. S.C.) at paras. 153; *Best v. WeatherallInline KeyCite Flag*, 2008 BCSC 608 (B.C. S.C.) at para. 22, reversed on other grounds 2010 BCCA 202 (B.C. C.A.).

[326] At para. 70, *Weaver* set out what a plaintiff must prove, on a balance of probabilities, in order to succeed on a defamation claim:

i. That the impugned words were defamatory;

ii. That the impugned words referred to the plaintiff; and

iii. That the impugned words were published, in that they were communicated to at least one person aside from the plaintiff.

[327] The plaintiff's defamation claim is for slander rather than the libel. Slander may or may not be slander *per se*. Slander *per se* does not require a plea or proof of special damages: *Rooney v. Galloway,* 2024 BCCA 8 at para. 99. The notice of civil claim alleges that the plaintiffs not only suffered damage to their personal reputations, but also damage to the plaintiffs' reputations with respect to their "profession, calling and business". The latter is actionable slander *per se*: Raymond E. Brown, Erika Chamberlain and Karen Eltis, *Law of Defamation (Canada, United Kingdom, Australia, New Zealand, United States)*, Second Edition (Toronto: Ontario: Thomson Reuters) at 8.19–8.20 [*Law of Defamation*].

[328] For slander *per se*, once the plaintiff establishes the three elements, falsity and damages are presumed and the onus shifts to the defendant to advance a defence in order to escape liability: *Weaver* at para. 70.

B. Whether Words Defamatory

[329] I am satisfied that the Statements, taken together, indicate that the owners/operators of Famous Original do not pay their bills as they come due and use their financial advantage to leverage creditors to accept less than what they are owed. I am also satisfied that, in context, telling Ms. Dilan to make certain she got paid for her Famous Original work right away communicated the view that the owner/operators of Famous Original were likely to treat Ms. Dilan in that manner. These words are allegations of dishonourable professional and business conduct that would tend to lower the plaintiffs' reputations in the eyes of a reasonable person. I find that the impugned words did have defamatory meaning and did so in their literal sense. I am also satisfied that they were said with malice.

C. Whether Words Published to a Third Person

[330] Mr. Usatch submits that there is no evidence that Ms. Dilan told anyone about the conversation nor that the Video has been viewed aside from for the purposes of this proceeding.

[331] The fact that the words were stated to Ms. Dilan is sufficient publication: *Law of Defamation* at 7.2:

> … The defamatory remarks, about which the plaintiff complains, must be shown to have been published to a third person, that is, they must have been communicated to some person other than the one defamed, even if that involves only a single individual, …. Publication to a considerable or substantial number of persons, or to the public generally, is not necessary. A person is entitled as much, in principle, to the esteem of a single individual as he or she is to the esteem of the entire world.

D. Whether the Words Referred to the Plaintiffs

[332] The plaintiffs say that the terms “they” and “them” in the Statements are references to CRAM, and to Mr. Khaneja, Mr. Sparling, and Mr. Wilkinson. Mr. Usatch says that none of the plaintiffs were identified by name and that there are any number of people to whom he might have been referring in those statements.

[333] There is an extensive discussion of indirect identification in *Grant v. Cormier-Grant*, [2001] 56 O.R. (3d) 215; 2001 CanLII 3041 (ON CA):

> [19] An essential element of the tort of defamation is proof that the defamatory statement was published of and concerning the plaintiff. Where, as in this case, the plaintiff's name does not appear in the defamatory statement, "it must be shown that the words used, or the circumstances attending the publication are such as, would lead reasonable persons to understand that it was the plaintiff to whom the defendant referred": See [R.E. Brown, *The Law of Defamation in Canada,* 2nd ed., (loose-leaf, 1999, Carswell) at Vol. 1] at p. 6-2. I would adopt and apply the following statement of the law in Brown at pp. 6-2 to 6-3:
>
> > In an action for defamation, it is the plaintiff's reputation that must be adversely affected. Therefore, in order to recover, the plaintiff must plead and prove that he or she is the one to whom the defamatory statement refers, that is, it must be shown to have been published 'of and concerning' the plaintiff. The defamatory publication 'must refer to some ascertained or ascertainable person, and that person must be the plaintiff.' It must refer to or concern him personally. The test in every case is whether the ordinary sensible person to whom the

> words were published would understand them as referring to the plaintiff. [Footnotes omitted.]

[20] In respect to identifying the plaintiff as the person defamed, Brown states at pp.6-5 to 6-6:

> It is not necessary that the plaintiff be identified by his or her proper name, or even mentioned at all, if it is otherwise shown that the words would be reasonably understood to refer to the plaintiff. He or she may be referred to in the guise of some fictional or historical character or by a play on words. It may be clear from other evidence that he was the one alluded to, but he must satisfy the court in that regard. This may be done by introducing evidence, apart from the publication, connecting the plaintiff with the defamatory publication. The question in such a case is whether or not the words used are such as to lead an ordinary sensible person, or reasonable persons, who pay reasonable attention to the contents of the communication, to understand that it was the plaintiff to whom the defendant referred.
>
> The test of whether words that do not specifically name the plaintiff refer to him or not is this: Are they such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to? That does not assume that those persons who read the words know all the circumstances or all the relevant facts. But although the plaintiff is not named in words, he may, nevertheless, be described so as to be recognized; and whether that description takes the form of a word-picture of an individual or the form of a reference to a class of persons of which he is or is believed to be a member, or any other form, if in the circumstances the description is such that a person hearing or reading the alleged libel would reasonably believe that the plaintiff was referred to, that is a sufficient reference to him. [Footnotes omitted.]

The test quoted by Brown is contained in the reasons of Isaacs J. in *David Syme & Co. v. Canavan* (1918), 25 C.L.R. 234 (Australia H.C.), at 238 and was applied in *Sykes v. Fraser* (1970), [1971] 1 W.W.R. 246 (Alta. T.D.), at 258, aff'd. [*Sykes v. Fraser*] (1971), 19 D.L.R. (3d) 75 (Alta. C.A.), aff'd. *Sykes v. Fraser* (1973), [1974] S.C.R. 526 (S.C.C.) . It was also applied in *Mouammar v. Bruner* (1978), 84 D.L.R. (3d) 121 (Ont. H.C.), at 123-124 .

[21] A similar statement of the test to be applied in deciding whether the defamatory statement was published of and concerning the plaintiff is found in *Gatley on Libel and Slander*, op. cit., at p. 161: "The test is whether the plaintiff may reasonably be understood to be referred to by the words." The authority provided for the test is the same passage from the reasons of Isaacs J. in *David Syme & Co. v. Canavan* quoted by Brown at pp. 6-5 to 6-6. At pp. 163-164 the discussion of the test continues:

> Where the plaintiff is referred to in an indirect way or by implication it will be a question of degree how far evidence will be required to connect the libel with him. At one extreme, if there is a libel on "the Prime Minister" that officer does not need to produce witnesses to testify that they know who he is. At the other extreme, the plaintiff may only be identifiable by reason of extrinsic facts which are not generally

> known, in which case there is no actionable publication unless it is shown that the words were communicated to persons with such knowledge. Even in the latter type of case, however, it is not enough that the recipients of the statement did understand it to refer to the plaintiff: the issue is whether reasonable people with their knowledge would so understand it. [Footnotes omitted.]
>
> …
>
> [23] In considering whether the alleged defamatory statement in *Arnott* was of and concerning the plaintiff, Kellock J. stated at p. 554:
>
> > As in *Knupffer v. London Express*, there are two questions involved in the attempt of the appellant to identify himself as the person defamed by the words here complained of. The first question is one of law, namely, in the words of Viscount Simon L.C., in the above case, at p. 121, can the article, having regard to its language, be regarded as capable of referring to the appellant?
> >
> > It is only when that question is answered in the affirmative that the second question, one of fact, arises, namely, does the article, in fact, lead reasonable people, who know the appellant, to the conclusion that it does refer to him?
>
> At p. 555 Kellock J. stated the test to be applied as follows:
>
> > To employ the language of Viscount Simon in the *Knupffer* case:
> >
> > > Where the plaintiff is not named, the test which decides whether the words used refer to him is the question whether the words are such as would reasonably lead persons acquainted with the plaintiff to believe that he was the person referred to.
>
> [24] It is clear from the decision of the House of Lords in *Morgan* that the test is an objective one, whether on the evidence an ordinary sensible person would draw the inference that the words referred to the plaintiff. ...

[334] In my view it is readily apparent that the Statements were made in reference to the owners/operators of Famous Original. I further find that it would have been readily apparent to Ms. Dilan that was the case. It is particularly evident in the references to “Joanna” (Ms. Danzinger’s first name) as the person who had arranged for Ms. Dilan to be working in the Premises. The “business” in the discussion clearly refers to the business in which they were both standing (e.g., “put somebody here … have those beer lines”: Mr. Usatch’s Examination for Discovery at QQ. 86 and 90; “This is all between myself and the owners of the business”: Mr. Usatch’s Examination for Discovery at QQ. 106–110).

[335] The next question, then, is whether a reasonable person acquainted with CRAM would recognize CRAM as the owner and operator of Famous Original. I find that a reasonable person acquainted with CRAM would. While CRAM has changed over time, at the relevant time, Famous Original was CRAM's sole business activity and Famous Original was a "doing business as" name for the restaurant location.

[336] Thus, I am satisfied that the Statements refer to CRAM. (Although the plaintiffs' plead that the CRAM had itself been defamed, they only seek damages in respect of the individual plaintiffs as the owners and directors of CRAM.)

[337] The further question, then, is whether a reasonable person would have understood that the Statements to refer to the individual plaintiffs as the owners and directing minds of CRAM. Mr. Usatch's plural references (e.g., "these guys") and the personification in the Statements are consistent with the individuals controlling CRAM being the real target of the Statements. Mr. Usatch also made specific reference to "the owners" of the business in the course of the conversation with Ms. Dilan. These circumstances would lead a reasonable person, familiar with the plaintiffs, to the conclusion that it refers to them as the owners and directors of CRAM.

[338] The second issue that arises with regards to the identification of the individual plaintiffs is due to the Statements referring to them as a group. In *Mainstream Canada v. Staniford*, 2012 BCSC 1433 at paras. 124–128; rev'd on other grounds, 2013 BCCA 341, Adair J. discussed the concept of group defamation:

> [125] Statements that do not refer to a plaintiff by name will nonetheless meet the "of and concerning" requirement if they may reasonably be found to refer to the plaintiff in the light of surrounding circumstances: see *Butler v. Southam Inc.*, 2001 NSCA 121 (N.S. C.A.) ("Butler"), at para. 39. A plaintiff must prove that the statements would lead reasonable people acquainted with the plaintiff to the conclusion that the statements refer to the plaintiff: see *Butler*, at para. 29 and *Grant v. Cormier-Grant* (2001), 56 O.R. (3d) 215 (Ont. C.A.), at paras. 19-20.
>
> [126] […] in some circumstances, defamatory statements about a group may be defamatory of the group's members individually even though they are not otherwise identified. This is sometimes called "group defamation." There are no special legal rules concerning individual claims of defamation based

> on statements made about a group. The fundamental question remains whether the statements could reasonably be found to be defamatory of the named plaintiff(s). See *Butler*, at paras. 49 and 53.
>
> [127] The issue of "group defamation" was discussed recently in *Bou Malhab c. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214 (S.C.C.) ("*Bou Malhab*"), where a class proceeding was brought on behalf of a group of approximately 1,100 Montréal taxi drivers. The plaintiff asserted that the members of the group had been defamed as a result of racist comments made by a radio show host known for his provocative remarks. Deschamps J. (for the majority) described and discussed a number of factors that can provide guidance to trial judges in determining whether statements made about a group could reasonably be found to be defamatory of individual members of the group.
>
> [128] The factors described by Deschamps J. are as follows (see *Bou Malhab*, at paras. 58-78): (a) the size of the group; (b) the nature of the group; (c) the plaintiff's relationship with the group; (d) the real target of the defamation; (e) the seriousness of the allegations; (f) the plausibility of the comments; and (g) extrinsic factors. The list is not exhaustive, and no one factor is determinative on its own.

[339] Looking at the factors outlined in *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9 at paras. 58–78, CRAM is a small corporation, with three directors and shareholders. I am of the view that CRAM and the individual plaintiffs are so-related as to enable a reasonable person acquainted with CRAM to recognize Mr. Khaneja, Mr. Sparling and Mr. Wilkinson as inextricably linked with the company and readily identifiable as the owners and controlling minds.

E. Justified (True) or Fair Comment

[340] In the Response to Amended Civil Claim, it is plead that the impugned words were all either true or fair comment. The defendants' closing written submission baldly states that "Any alleged statements made by Usatch on June 23rd, 2018 […] were either true or fair comment".

[341] Justification is a complete defence to an action for defamation, however, the defendant must prove the truth of "every injurious imputation which the [court] find[s] to be conveyed by the publication": *Price v. Chicoutimi Pulp Co*. (1915), 51 S.C.R. 179 (S.C.C.), 1915 CanLII 66 at 199 – 200, concurring reasons of Duff J.

[342] I am satisfied that the Statements were false. The defendants have not established that the impugned words were true or fair comment. To the contrary, on

the evidence, it has been established that work done for CRAM in respect of Famous Original resulted in a single lien – the Sculpin lien – being filed, and CRAM paid Sculpin after Olde Towne refused to pay Sculpin directly. Mr. Khaneja testified that none of the trades that worked for CRAM had hired a lawyer to fight with CRAM and that none of those trades were paid less money than was agreed upon. Mr. Khaneja testified that CRAM did not spend $20,000 fighting its water bill, or regularly retain lawyers, or otherwise behave in a financially high-handed manner.

[343] It is unclear which words within the Statements the defendants claim amount to a "fair comment". In any event, whatever opinion was offered by Mr. Usatch in the Statements was premised on his related statement of facts (which were untrue), and thus no part of them can constitute fair comment. In any event, the Statements were made with malice.

XIII. DAMAGES FOR BREACH OF CONTRACT

A. In General

[344] Damages for breach of contract were recently summarized by Veenstra J. in *Real Organics*:

> [274] ... Damages for breach of contract aim to put the plaintiff in the position they would have been in had the wrong not been done. That in turn requires an assessment of what the plaintiff's position would have been had the defendant fulfilled its side of the bargain. As noted in *Water's Edge Resort Ltd. v. Canada (Attorney General*), 2015 BCCA 319 at paras. 39-40:
>
> > [39] … [W]hereas in tort, damages are generally intended to place the plaintiff in the position he or she would have been in had the wrong not been committed (i.e., 'reliance' damages), damages in contract are generally intended to place the innocent party in the position he or she would have occupied had the contract been carried out by both parties (i.e., 'expectation' damages). (See H.D. Pitch and R.M. Snyder, *Damages for Breach of Contract* (looseleaf) at 1-1; *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co*. 1991 CanLII 27 (SCC), [1991] 3 S.C.R. 3 at 14; *Fidler v. Sun Life Assurance Company of Canada*, 2006 SCC 30 at para. 27.) Pitch and Snyder observe:
> >
> > > The difference between these two tests is significant. In a contract action, the court considers what benefits the plaintiff would have achieved had the contract been carried out. In a tort action the court considers what losses the plaintiff would

> have avoided had the incident not occurred. Thus, in a sale of goods action, the court awards the plaintiff the profit that would have been earned had the transaction been completed. In a personal injury action the court attempts to compensate the plaintiff for injuries and losses. Fuller and Perdue [see (1936-7) 46 Yale L.J. 52 at 373] the authors of the leading article on the subject of the quantification of damages for breach of contract, have explained that the reason the courts have awarded the "loss of bargain" as damages is to encourage contracting parties to carry out their obligations, by making it prohibitively expensive, if they fail to carry out those obligations. As they explained:
>
> > [It] encourages people to perform their side of a bargain thereby upholding the working of the market economy … if parties could only recover their reliance interest (expenses) there would be no incentive to perform – in fact, this principle encourages people to enter into contract. [At §1.1; footnotes omitted.]
>
> [40] In contract, the test is in my view most conveniently enunciated as an 'even if' one: would a purchaser of widgets have been unable to sell them 'even if' the products had complied with the specifications in the contract? Would a disgruntled client of a broker have suffered the losses he claims 'even if' the broker had sold his securities when instructed? The task of resolving this type of question is inherently more uncertain than the task before the court in most tort cases. Still, it may be possible to express the test as a 'but for' one even in contract: would the purchaser of widgets have made the profits it claims 'but for' the failure of the defendant to meet the specifications? Or, in the case at bar, would Water's Edge still have its interest in the Lease 'but for' the assumed breach of the *Bhasin* duties by the Ministry?

[275] Where the duty of honest performance is breached, the following comments of Justice Kasirer in Callow are of assistance with respect to the judgment in Bhasin:

> [113] … Damages were awarded using the ordinary measure of contractual expectation damages, namely to put Mr. Bhasin in the position he would have been in had Can-Am not breached its obligation to behave honestly in the exercise of the non-renewal clause (*Bhasin*, at paras. 88 and 108). This resulted in Mr. Bhasin being compensated for the value of his business that eroded (paras. 108-10). As Professors O'Byrne and Cohen helpfully explain, "if Can-Am had dealt with Bhasin honestly on all fronts (though without requiring it to disclose its intention not to renew), Bhasin would have realized much sooner that his relationship with Can-Am was in tremendous jeopardy and reaching a breaking point. He could have taken proactive steps to protect his business, instead of seeing it 'in effect, expropriated and turned over to Mr. Hrynew'" ("The Contractual Principle of Good Faith and the Duty of Honesty in *Bhasin v. Hrynew*" (2015), 2017 ABCA 164, 53 Alta. L.R. 1, at p. 8 (footnotes omitted)).

[276] In *Callow* itself:

> [116] As the trial judge found, Baycrest "failed to provide a fair opportunity for [Callow] to protect its interests" (para. 67). Had Baycrest acted honestly in exercising its right of termination, and thus corrected Mr. Callow's false impression, Callow would have taken proactive steps to bid on other contracts for the upcoming winter (A.F., at paras. 91-95). Indeed, there was ample evidence before the trial judge that Callow had opportunities to bid on other winter maintenance contracts in the summer of 2013, but chose to forego those opportunities due to Mr. Callow's misapprehension as to the status of the contract with Baycrest. In any event, even if I were to conclude that the trial judge did not make an explicit finding as to whether Callow lost an opportunity, it may be presumed as a matter of law that it did, since it was Baycrest's own dishonesty that now precludes Callow from conclusively proving what would have happened if Baycrest had been honest (see *Lamb v. Kincaid* (1907), 1907 CanLII 38, 38 S.C.R. 516, at pp. 539-40).

[345] As the claim is one for loss of opportunity, I take note of the recent comments of the Court of Appeal in *Ojanen v. Acumen Law Corporation*, 2021 BCCA 189:

> [62] … The law has long recognized that the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for a breach of contract. In *Chaplin v. Hicks*, [1911] 2 K.B. 786 (C.A.), which I would note was also a loss of opportunity claim, in an oft-quoted passage, Fletcher Moulton L.J. at 795 said:
>
> > … where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case.
>
> See also *Penvidic v. International Nickel*, 1975 CanLII 6 (SCC), [1976] 1 S.C.R. 267 at 279–80; *Wood v. Grand Valley Railway Co*. (1915), 1915 CanLII 574 (SCC), 51 S.C.R. 283 at 289; and *Bawa v. Noton* (1996), 1996 CanLII 3360 (BC CA), 74 B.C.A.C. 154 at paras. 15–16.
>
> [63] What Ms. Ojanen lost as a result of her wrongful termination was the opportunity to become a lawyer at the end of the articling period. This Court in *Pacific Destination Properties Inc. v. Granville West Capital Corp*., 1999 BCCA 115, set out the approach to be followed in assessing a loss of opportunity claim:
>
> > [54] In assessing damages for loss of opportunity the court must reach a conclusion as to what would have taken place had there been no breach. If it is shown with some degree of certainty that a specific contract was lost as a result of the defendant's breach, some damages should be awarded. Even though the plaintiff may not be able to prove with certainty that it would have obtained specific results but for the breach, it may be able to establish that the defendant's breach deprived it of the opportunity to obtain such business. See:

> *Houweling Nurseries Ltd. v. Fisons Western Corporation* (1988), 1988 CanLII 186 (BC CA), 37 B.C.L.R. (2d) 2 (C.A.).
>
> [55] In *Bradshaw Construction Ltd. v. Bank of Nova Scotia* (1992), 1992 CanLII 4038 (BC CA), 73 B.C.L.R. (2d) 212 (C.A.) this Court considered the principles applicable to damages, including a claim of a loss of opportunity. At pages 228-229, the court referred to the following as a correct statement of the applicable law for loss of opportunity (as set out by the trial judge):
>
> > When deciding whether the plaintiff suffered any damages as a consequence of the actions of the defendant, Bradshaw must prove the existence of a loss on a balance of probabilities. It has done so. But when it comes to assessing the actual amount of the loss the standard of proof is not so strict.
> >
> > Determining the amount of damages in these circumstances is largely a matter of assessing the strength and weaknesses of various possibilities. It is much like measuring the amount of a past or future loss of income in a personal injury action. The more certain the possibility of the loss the greater the award; the less certain the possibility the smaller the award. When looking at events that may have taken place but for a certain event, it is impossible to say what would have probably happened when that event came about, because one does not know the nature of the circumstances at the relevant time when the event might have occurred. The best that can be estimated are the possibilities, not the probabilities.

[346] CRAM entered two expert reports in support of two different approaches to valuing its expectation losses. As one approach, CRAM seeks an award based on a loss of opportunity to sublease the Premises. For this approach, CRAM relies on a report authored by Katie Snell, an appraiser, which establishes a calculation of the rental income CRAM would have earned from subleasing . As a second approach, CRAM seeks an award based on a loss of opportunity to join with Tiverton and jointly operate the Burger Bar Concept as contemplated at the Parkside Meeting. Josh Matte, a business evaluator, has provided a report regarding the income that CRAM could have expected to receive from its participation in such a venture.

B. Expectation Damages - Subleasing Opportunity

[347] As Mr. Khaneja had set out in his June 24, 2018, email to Mr. Usatch, CRAM's subleasing opportunity was based on the fact that with the Conversion and the passage of time, sublease rent for the Premises would significantly exceed CRAM's rent under the Lease: "we have had offers for at least $7500 and expect the fmv [fair market value] to be much higher".

[348] The Lease was a gross lease under which Olde Towne was responsible for all costs of property taxes, insurance, operating expenses, management, repairs and maintenance (except for any operating or repair costs as a result of negligence or breach of the lease) at no extra cost to the tenant. Again, the Lease stipulated an effective rent of $5500 (gross) for the original term, rent for a first renewal term of no less than $5500 and no more than $6300 (gross), and rent for a second renewal term of no less than $6300 (gross). Section 8 of the Lease provided that the renewal rent was to be "then current market rental" for the Premises, and that failing agreement, was to be determined by arbitration.

[349] Ms. Snell provided an appraisal report, dated January 10, 2023, addressing the Premises' retrospective fair market rentable value as of July 1, 2018 (the "Snell Report"). Notably, her estimates of fair market value including the assumptions that: CRAM had invested approximately $340,000 into improvements to the Premises in 2015; the Premises were, in 2018, a turnkey restaurant for lease; and, CRAM could transfer its existing business licenses for the space (Snell Report, pp. 4-5).

[350] Ms. Snell appraised the fair market rental value of the Premises as of July 2018 using a direct comparison approach (p. 30). She identified two strong comparators and produced an "an intermediate base range of $32.30 to $37.45 per sf, fully net (p. 35).

[351] When Ms. Snell was given instructions, she was given a redacted 76-month lease for the Premises commencing September 1, 2018 and expiring December 31, 2024. Other evidence demonstrates this was a redacted version of the lease between Olde Towne and Chuck's Restaurant Group Ltd. ("Chuck's") executed on August 8, 2018 ("Chuck's Lease"). Chuck's Lease provided for a *base rent* $7,250 per month (plus GST) for the first 60 months and $7500 per month (plus GST) for the remaining 16 months. Taking into an upfront two month rent holiday and a potential improvement credit, Ms. Snell found the Chucks Lease resulted in $34.14 per sf, fully net (p. 36). Thus, she found the Chuck's Lease rent per sf, fully net, to be within the fair market value range produced under the direct comparison approach.

[352] Chuck's Lease, however, also calls for *additional rent* per month in the form of tenant contributions to maintenance costs, including repairs, maintenance, utility charges, cleaning, insurance coverage, and property management fees. The additional rent accounted for in order to determine the gross rent payable.

Adverse Inference Warranted

[353] The gross rent actually paid to Olde Towne in respect of the Premises since July 2018 is a matter within its knowledge and control. With the exception of a single cheque from Chuck's in 2019, Olde Towne has not disclosed documents indicating the amounts actually received. At trial, Mr. Usatch testified that there is now a new tenant, and that the new tenant had been assigned Chuck's Lease. There has been no document disclosure relating to amounts received from the current tenant, nor of any assignment agreement. Olde Towne's assertion that it has produced all of the relevant documents it has is not credible. If nothing else, Olde Towne would have records showing receipt of funds from the current tenant. I am satisfied that an adverse inference with respect to the gross rental income received by Olde Towne in relation to the Premises following termination of the Lease is warranted.

Gross Rent: Scenario 1 and 2

[354] Ms. Snell was asked to assume, alternatively, that the new tenant paid either $1000 per month (scenario 1) or $3000 per month (scenario 2) as additional rent under Chuck's Lease. Using those assumptions, she calculated $38.56 (scenario 1) and $48.16 (scenario 2) as the gross rent per sf.

Limited Disclosure Post-Snell Report

[355] Subsequent to the Snell Report, Olde Towne disclosed three additional documents relevant to the gross rent actually paid under the Chucks Lease:

a) An email to Chuck's from Olde Town dated December 28, 2018 indicating a total rent $8,042.50 (exclusive of GST) per month from January 1, 2019 forward (base rent of $7250 + water bill of $430, plus a management fee of $362.50);

b) An email to Chuck's dated August 30, 2019 from Old Towne indicating a total rent of $8,642.50 per month (exclusive of GST) payable for the lease year 2019/2020 (base rent of $7250 + CAM fee of $600 (presumably Common Area Maintenance) + water bill of $430 + a management fee of $362.50);

c) A cheque from Chuck's to Olde Towne dated December 1, 2019 in the amount of $9,074 ($8,642.50 + $432.12 GST).

[356] The two emails between Olde Towne and Chuck's indicate operating costs of $792.50 and $1392.50 respectively. I find that these are low estimates. (The $792.50 charge reflects a time limited credit.) It is evident that Chuck's Lease permits the scope and amount of forthcoming operating costs to be increased by Olde Towne. As a proportionate charge to the base rent, the management fee would automatically be subject to at least a minimum increase during the renewal term.

[357] I find that an average monthly operating cost amount of at least $1500 is warranted (which would put it at the mid-point between Ms. Snell's scenario assumptions).

CRAM's Rent over Lease and Renewal Terms

[358] To calculate expectation damages, it is necessary to assess the rent due and owing to Olde Towne by CRAM in order to deduct that amount from CRAM's anticipated rental income over that period.

[359] In its closing submissions, CRAM proposed calculating the amount payable by CRAM to Olde Towne on the remainder of the original term (26 months) and the first and second renewal terms (60 months each) as follows (with reference to the rent parameters set by the Addendum):

a) Rent payable by CRAM during remainder of original Lease term = **$5500** per month;

b) Rent to be paid by CRAM during the first renewal term (between the minimum ($5500) and maximum ($6300) under the Addendum) at the mid-point of **$5900** per month;

c) Rent to be paid by CRAM during the second renewal term (to be not less than $6300 per month under the Addendum) set at **$6700** (the maximum rent for the second renewal term ($6300) plus $400 (the same amount as the increase between the original and first renewal terms)).

Valuing the Lost Subleasing Opportunity

[360] CRAM's proposed calculation of its payable rent as compared against Ms. Snell's two gross sf values yields the following subleasing profit losses:

	Scenario 1 (base rent + additional rent of $1000 per month)	**Scenario 2** (Base rent + additional rent of $3000 per month)
26 months remaining in original Lease term	($8,033.08 - $5500) x 26 = $65,860.08	($10,033.08 - $5500) x 26 = $117,860.08
60 months in 1st renewal term	($8,033.08 - $5900) x 60 = $127,984.80	($10,033.08 - $5900) x 60 = $247,984.80
60 months in 2nd renewal term	($8,033.08 - $6700) x 60 = $79,984.80	($10,033.08 - $6700) x 60 = $199,984.80
CRAM Rental Income earned by subleasing	**$273,829.68**	**$565,829.68**

[361] As above, I find that it a very unlikely that Olde Towne would received anything less than $1500 per month as additional rent over the course of the Chuck's Lease. Further, these calculations assumes no staggered percentage

increases to rent that would be charged by CRAM to their subtenant. In that respect, the chart is very conservative. On the other hand, there is a possibility that the rent to be paid by CRAM to Olde Towne in the first renewal term might have exceeded $5900 (although it could not be above $6300) and might have exceeded $6700 in the second renewal (although the increases would be limited by the mechanism of arbitration).

[362] Taking all of this into account, I find that CRAM's expectation damages are $450,000.

[363] I would not make any deduction for the contingency that Olde Towne might have refused to approve a sublease. Use as a restaurant/lounge was an express permitted use under the Lease. The Conversion was done for that use, and CRAM was looking to capitalize on its investment in the Conversion by subleasing as turnkey restaurant operation. I do not think there is any real possibility of CRAM's being unable to identify at least one potential subtenant that would reasonably have been required to be approved. I note that Olde Towne had no apparent difficulty in identifying tenants for the Premises on those terms.

[364] There is no issue of failure to mitigate. The opportunity to sublease was predicated on holding the Lease. CRAM was completely deprived of its ability to sublease the Premises effective June 27, 2018.

C. Expectation Damages – Lost Operating Profit

[365] A report, dated January 6, 2023, was prepared by Josh Matte, who is a Chartered Professional Accountant and a Chartered Business Valuator (the "Matte Report"). The Matte Report projects the profits that a business venture between CRAM and Tiverton ("NewCo") would have received had it gone ahead. Mr. Matte was given the following set of assumptions:

> **1.3 Assumptions of Fact**
>
> 15 In arriving at my opinion, I was directed to rely upon the following assumptions, in addition to the assumptions noted throughout this report:

a) The terms of the Lease and the Lease addendum dated June 22, 2015 would have been complied with had the Lease not been terminated and that the Lease would have been renewed on two occasions according to the terms of the Lease so that the total duration of the Lease would have been 15 years, commencing on September 1,2015 and ending on August 31, 2030;

b) CRAM had been issued appropriate business and liquor licenses to operate at the Property a food primary licensed restaurant or lounge or food primary licensed bar, and the licenses would have remained in effect for the duration of the original term of the Lease and both the renewal terms;

c) CRAM and Tiverton Holdings Ltd. would have operated a new restaurant or lounge or bar business from the Property and Ferris' would have been the manager and operator of the new business. NewCo would have sold food and alcohol in compliance with the license;

d) NewCo would have been owned 51.22% by Ferris' and 48.78% owned by CRAM or the owners of CRAM, and the income from NewCo would have been paid out to the owners proportionate to their ownership;

e) NewCo would have commenced operating at the Property on July 1, 2018 and continued operating to August 31, 2030;

f) The financial projections created by Ferris', Financial Projections of Ferris Oyster Bar/Tiverton Holdings Ltd., were prepared in good faith and relied on current, accurate information. These projections are presented as Schedule 2.0 to this report;

g) The gross leasable area rented by CRAM Food Group Ltd. pursuant to the Lease was approximately 2,500 square feet;

h) The average number of employees working for CRAM Food Group Ltd. at Famous Original during 2017 was five;

i) NewCo projected that on a weekly basis staff would be required for 28 shifts to be filled by five full-time employees and one part-time employee;

j) NewCo was to operate a business described as a casual bar and grill serving specialty cocktails and beers;

k) The improvement costs to the Property were $345,022, reflecting the original cost of leasehold improvements on CRAM Food Group Ltd.'s 2016 financial statements;

l) There would be no reinvestment in NewCo's leaseholds over the projected period;

m) The annual replacement costs for NewCo's equipment and furniture assets would range between $2,500 to $7,500 for fiscal 2019; and

n) NewCo's furniture and equipment replacement costs subsequent to fiscal 2019 would be within the same range as fiscal 2019, adjusted for inflation.

16 In arriving at my opinions, I have also assumed in addition to other assumptions noted throughout this report, that:

a) Items listed in Appendix C: Sources of Information and Analysis of this report are materially accurate and free from material misstatement unless otherwise indicated herein;

b) The impact of the COVID-19 pandemic on the local hospitality industry is not reflected in my conclusion, as this was not known at the Lease Termination date and my analysis does not consider hindsight;

c) As a result of the early termination of the Lease, CRAM disposed of its furniture, equipment, and leasehold assets in 2018 and recorded a loss upon their disposal. But for the early termination of the Lease, I have assumed that CRAM's furniture, equipment, and leasehold assets would have been transferred to NewCo.

[366] Notably, the financial projections referred to at para. 15(f) of the Matte Report are the Burger Concept Projections done up by Mr. Craggs in June 2018. The Matte Report finds that, had NewCo proceeded with the Burger Concept, then over the period of the remaining Lease and renewal options, NewCO would have earned a profit of $801,000 to $979,000, with CRAM's share of that profit then being $391,000 to $478,000.

[367] Olde Towne objects to the report's reliance on the Burger Concept Projections on the basis that it amounts to Mr. Craggs giving expert evidence in a proceeding in which Four Top is the plaintiff. I am not persuaded that this is the case. Mr. Matte relied on the Burger Concept Projections as a model for the nature of the undertaking, including how staff would be scheduled and anticipated costs. Obviously, Mr. Craggs relied on his own knowledge and experience outlining the operations and budget, but he was outlining an actual business plan that Tiverton was, in June 2018, prepared to put into action if a share purchase agreement was reached in keeping tiwth the Parkside Meeting.

[368] Further, the Matte Report does not simply incorporate the Burger Concept Projections. As outlined in his report, Mr. Matte reached his conclusion relying upon:

a) The 12-month Burger Concept Projection created by Mr. Craggs;

b) Full-service restaurant industry benchmarks;

c) Metrics from private company transactions in the full-service restaurant industry; and

d) His professional experience as a business valuator, which included his review of financial statements and other information of twenty-three full-service restaurants operating on Vancouver Island and in the Lower Mainland of BC.

[369] This is evident at paragraphs 39–66 of the Matte Report, where Mr. Matte outlines what he does and does not accept from the Burger Concept Projections and, where he does not, what information he considers more reliable. For example, at paras. 63–66, Mr. Matte concludes that Mr. Craggs' projection of wages and benefits as an expense in terms of total sales is too low and adopts a Canadian full-service industry average in preference.

[370] I am of the view that the Matte Report is an admissible and independent report, notwithstanding Mr. Matte's use of the Burger Concept Projections. I am, however, satisfied that the facts and assumptions underlying the Matte Report are too speculative to found an alternative claim for lost profit, both with respect to the conclusion of share purchase agreement and the amounts that would be made.

D. Reliance Damages – Lost Investment

[371] CRAM also sought reliance damages in relation to its lost investment in the Premises. In my view, in the circumstances of this case, CRAM's claim for lost investment in the Premises can only be as an alternative to its claim for expectation damages. CRAM can either claim for subleasing based on the value of the Premises as a turnkey restaurant (as in Ms. Snell's report) or claim that it should get back its investment in improving the Premises to make it a turnkey restaurant.

[372] Given the possibility of an appeal and the fact that the evidence was fully heard, I will make an alternative finding regarding reliance damages. CRAM relies on *1413910 Ontario Inc. v. Select Restaurant Plaza Corporation*, [2006] O.J. No. 5309; 2006 CanLII 44266 (ON SC) [***Bull's Eye***] as setting out the general principles of application in a somewhat similar action. There, the plaintiff company, carrying on business as Bulls Eye Steakhouse Restaurant ("Steakhouse") sought damages following the termination of its lease. The Steakhouse had been operating at a loss at the time of the termination.

[373] With respect to the lost investment claim, Justice Herman stated:

> [37] Where it is not possible to award the expectation interest, a party may elect to have damages that protect the reliance interest, that is, those expenditures made in reliance on the contract being performed. In situations where the loss of profit is difficult to prove, a plaintiff may elect to abandon the claim for lost profit and seek, instead, a repayment of expenses (*Anglia Television v. Reed*, [1972] 1 Q.B. 60 (C.A.); *Apotex Inc. v. Global Drug Ltd*. (1998), 1998 CanLII 14798 (ON SC), 83 C.P.R. (3d) 448 (Ont. Gen. Div.), aff'd 2001 CanLII 7436 (ON CA), [2001] O.J. No. 3849 (C.A.)). Bulls Eye concedes that determining the amount of lost profit would be speculative in this case. It has therefore chosen not to make a claim for lost profit and claims, instead, a return of the investment it made in reliance on the landlord honouring the terms of the lease.
>
> [38] In order to award damages for a lost investment, the court must be satisfied that the business would have generated sufficient revenue to recover that investment had the contract not been wrongfully terminated (*Apotex Inc. v. Global Drug Ltd*. (1998), 1998 CanLII 14798 (ON SC), 83 C.P.R. (3d) 448 (Ont. Gen. Div.), aff'd 2001 CanLII 7436 (ON CA), [2001] O.J. No. 3849 (C.A.); *Angoss II Partnership v. Trifox, Inc*., [1997] O.J. No. 4969 (Gen. Div.)). Bulls Eye maintains that it would, at the very least, have made enough money to recoup its investment.
>
> [39] Select, on the other hand, takes the position that Bulls Eye was a losing proposition and, in all likelihood, would never have recovered its investment. Therefore, it submits that Bulls Eye's claim should be limited to the liquidation value of the chattels at the time of termination less the value of those items that were returned.
>
> [40] The onus is on the defendant to establish that the business would not have generated revenue sufficient to recover its investment. As noted by Professor Waddams in the *Law of Damages* (looseleaf (Aurora: Canada Law Book Inc., 2005) at para. 5.230), and cited with approval by Blair J. in *Angoss II Partnership v. Trifox, Inc., supra* at para. 219:
>
> > Nevertheless, the result of the case may be supported on the basis that, in the absence of proof one way or the other of the profitability of the [enterprise] it is to be assumed against the wrongdoer that the

> enterprise would at least have broken even, that is, that the expenses would at least have been covered by revenue. It is suggested that it is not unjust to make such a presumption against the defendant who is the party in breach of contract. It would still be open, on this approach, for the defendant to prove, if possible, that the expenses would not have been recovered from revenues, and on proof of that fact, the defendant ought not to be liable to pay for the expenses.
>
> [emphasis added.]

[374] With respect to the claim for a loss of anticipated operating profit, the onus was on CRAM. I have found that the evidence is too speculative to establish that CRAM would have earned $391,000 to $478,000 in profit under the Burger Concept but for the termination of the Lease. However, I accept the Matte Report as establishing that CRAM had a realistic plan for re-opening. It also had Tiverton's established track record with respect to the operation of the new restaurant in the Premises.

[375] In my view, that is sufficient to entitle CRAM to rely on the assumption that it would have broken even had it continued operating in the Premises, as noted in *Bulls Eye* at para. 40). Thus, the onus is on Olde Towne to establish that CRAM would not have done so.

[376] Olde Towne has not discharged its onus of establishing that CRAM would not have recouped its investment. CRAM is entitled to an award of damages for lost investment provided the Court is satisfied that operating a business in the Premises would have generated sufficient revenue for CRAM to recover that investment, had the Lease not been wrongfully terminated. I am satisfied based on the Conversion Invoices, Mr. Khaneja's testimony and CRAM's financial records that CRAM invested at least $340,000 into Premises in order to complete the Conversion.

[377] The defendants say that an adverse inference should be drawn because CRAM did not call the billing persons to testify about providing the labour and materials covered by the Conversion Invoices. Mr. Khaneja testified that he reviewed the Conversion Invoices on an ongoing basis and attended the Premises to view the progress of the Conversion regularly. CRAM's bank records show that the payments

were made to the invoicing parties. That is sufficient evidence to establish that the Conversion was done and paid for. No adverse inference is warranted.

[378] Accordingly, but for the award of expectation of profit set out above, I would conclude that CRAM was entitled to $340,000 as reliance damages.

E. Aggravated and Punitive Damages

[379] CRAM also seeks aggravated and punitive damages. The applicable principles were recently summarized in *Johnson v. British Columbia (Attorney General*), 2022 BCCA 82:

> [83] … Aggravated damages are compensatory in nature, and their primary aim is to compensate the plaintiff while recognizing the egregious nature of the behaviour in response to which they are awarded: *Norberg v. Wynrib*, 1992 CanLII 65 (SCC), [1992] 2 S.C.R. 226 at 264; *Whiten v. Pilot Insurance Co*., 2002 SCC 18 at para. 116. Secondarily, they may also serve to satisfy the objectives of retribution, deterrence and denunciation. Where they are insufficient to achieve those objectives, however, the court may turn to punitive damages: *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd*., 2002 SCC 19 at para. 87.
>
> [84] The purpose of punitive damages, as the name suggests, is to punish the defendant rather than to compensate the plaintiff: *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130 at para. 196. The objectives of punitive damages are retribution, deterrence and denunciation. They may be awarded where there has been "highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour" and are assessed "in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant": *Whiten* at paras. 74, 94.

[380] It is doubtful in this jurisdiction that an award of aggravated damages is available to a corporate plaintiff: *Northwest Organics, Limited Partnership v. Fandrich*, 2019 BCCA 309 at paras. 126–127; *Premier Finance Ltd. v. Ginther*, 2022 BCSC 1461 at para. 61. Even if they were available to CRAM, I would not award any here.

[381] With respect to punitive damages, CRAM relies on *Coast Hotels Ltd. v. 389079 B.C. Ltd*., 63 BCLR (3d) 359; 1998 CanLII 6806 (BC SC), wherein punitive damages were awarded in respect of a breach of a commercial lease. The basic

facts and the basis for the punitive damages award are concisely set out in Justice Shaw's reasons for judgment:

> [2] In February, 1991, Coast leased space in the Coast Plaza Hotel to 389079 B.C. Ltd., doing business as Olympic Athletic Club. The space was to be used for a fitness facility and a lounge. The fitness facility comprised an aerobics room, a physical fitness room, handball and squash courts, a locker room and a shower room. The total leased area was over 17,000 square feet. Part of the area, approximately 4,000 square feet, was to be used for the lounge.
>
> ...
>
> [5] On Saturday, September 11, 1993, Coast evicted Olympic and took over possession of the premises. Coast did so by coming to Olympic's premises at 3:00 a.m. with a locksmith who changed the locks. Then, when Olympic's employees arrived at work, Coast persuaded them to continue their work, but as employees of Coast, not of Olympic. At the time of the eviction, Coast took possession of all the equipment used by Olympic, most of which belonged to Olympic. Coast also took over Olympic's membership list of approximately 2,000 members and notified them that Coast was taking over the running of Olympic Athletic Club and would honour their memberships. Coast then levied and collected the monthly membership dues of the members. Coast proceeded to use all of Olympic's equipment, declining to return it for approximately 6 months, by which time Coast had arranged for another operator to take over. All of these acts took place without the consent of Olympic.
>
> ...
>
> [145] Olympic also claims punitive or exemplary damages. In my view, the conduct of Coast was high handed and reprehensible. The method by which it arranged and carried out the take-over and its knowing seizure and use of Olympic's assets are, I find, deserving of punishment. Coast made a conscious business decision to appropriate Olympic's property and use it during the interim period required to find another tenant. While Coast contends that it suffered a loss during this period, I infer that whatever loss it may have encountered was substantially diminished by the use it made of Olympic's assets.
>
> [146] I assess punitive damages in the sum of $100,000.

[382] I am satisfied that punitive damages are warranted here and that they should be significant. Olde Towne terminated the Lease unlawfully in order to reclaim the post-Conversion Premises and re-let directly them at a much higher rent. The June 11 Letter essentially set CRAM up to fail and I am satisfied that Olde Towne had resolved to take the position that CRAM was in default regardless of what CRAM did

in response to the June 11 Letter. Olde Towne then re-let the Premises at higher rent to its own advantage.

[383] By the making of the Threats and timing of the Notice of Termination during the Closure, Olde Towne pre-emptively kept CRAM from implementing a business concept that might have generated an award for loss operating profit, leaving only a possible claim for loss of opportunity to sublease. By proceeding as it didi, Olde Towne's created a set of circumstances in which the profit Olde Towne stood to gain by breaching the Lease would effectively underwrite Olde Towne's exposure for damages for doing so in the event CRAM litigated. The general damages award granted above provides minimal (if any) deterrent in these circumstances.

[384] I am also satisfied that Olde Towne's conduct was high-handed and reprehensible and warrants denouncement.

[385] Therefore, I grant punitive damages in the amount of $100,000.

XIV. DAMAGES FOR DEFAMATION

[386] Mr. Khaneja and Mr. Sparling seek awards as individual plaintiffs. CRAM does not seek an award of damages for defamation.

[387] In *Peterson v. Deck*, 2021 BCSC 1670 at para. 110, the court summarized the principles governing the assessment of general damages for defamation:

> As Justice Cory adopted in *Hill*, at para. 182, damage assessments for defamation are a highly fact specific exercise governed by all the circumstances of the particular case. The court should consider "the conduct of the plaintiff, his position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of any retraction or apology, and the 'whole conduct of the defendant from the time when the libel was published down to the very moment of [the] verdict'": *Northwest Organics, Limited Partnership v. Fandrich*, 2019 BCCA 309 at para. 116, quoting *Hill*.

[388] Mr. Khaneja's evidence is that he is known as a business investor in the Victoria area, and that he deals with a pretty "tight" community of business people in that respect. He said that in his experience Victoria investment opportunities are often made known (or, alternatively, not made known) to possible participants

depending on their professional reputation among the community members. Mr. Khaneja's evidence is that a reputation for honesty, trustworthiness, being unlitigious and being fair are valuable assets in his field. Mr. Sparling testified that he is known, both as a individual business professional and in his involvement with Tiny Capital, as a person who conducts straightforward and fair acquisitions and investments with small businesses. Like Mr. Khaneja, Mr. Sparling expressed concern about the defamatory sting of the Statements in terms of loss of opportunity. None of their testimony on these points was seriously contested and I accept it.

[389] The particular effect of defamation with regard to a person's profession was highlighted by the Ontario Court of Appeal in *Rutman v. Rabinowitz*, 2018 ONCA 80 at 66–67 (leave to appeal to SCC ref'd, [2018] S.C.C.A. No. 130):

> [66] The injurious effects of defamatory statements regarding a professional are particularly acute. *Hill*, which involved libelous statements about a young lawyer who went on to achieve great professional success, is a case in point. As the Supreme Court stressed, at paras. 180-181, a lawyer's reputation is of paramount importance. Clients, colleagues and the courts depend on the lawyer's integrity, and "[a]nything that leads to the tarnishing of a professional reputation can be disastrous for a lawyer." The defamed lawyer has no way of knowing what members of the public, colleagues and others may have been affected by the defendant's defamatory allegations or of being certain who may have accepted the false allegations of wrongdoing levied against him.
>
> [67] These comments are apposite here. The importance of a reputation for integrity and trustworthiness is not confined to lawyers. It applies equally to other professions and callings, including chartered accountants and tax advisors like *Rutman*: *Botiuk*, at paras. 91-92.

[390] Notably, the Statements had a clear effect on Ms. Dilan. She took them very seriously. Ms. Dilan was upset when she spoke with Ms. Danzinger about it and described herself as having been "shook up" by the conversation. Ms. Dilan was hired to work through to July 5th, but she declined to do any further work for CRAM.

[391] While there is no actual evidence of re-publication by Ms. Dilan, in my view the probability of re-publication is not unlikely. Ms. Dilan works in the hospitality industry. The story of how and why she once quit a job after a single day could well be an on-topic story in any number of social and business situations for her. There is a real possibility of ongoing harm by re-publication: *Rutman* at para. 65.

[392] Further, truth and fair comment were plead and that position was maintained throughout the trial, up to and including the defendants' closing submissions (notwithstanding the failure to call evidence directed at establishing either defence).

[393] Mr. Khaneja and Mr. Sparling seek general damages of $30,000 apiece. They rely on the following cases in support of $30,000 as their position on the range of awards: *Salager v. Dye & Durham Corporation*, 2018 BCSC 438 at 180–181 (in relation to profession: $25,000); *Kazakoff v. Taft*, 2018 BCCA 241 (felony conviction: $35,000); *Zall v. Zall,* 2016 BCSC 1730 at para. 90–94 and the cases cited therein (sexual impropriety: $30,000 to $75,000); *Peterson v. Deck*, 2021 BCSC 1670 (profession: $30,000); *Premier Finance Ltd. v. Ginther*, 2022 BCSC 1461 (deceit and fraud in business: $30,000 to individual plaintiffs).

[394] Mr. Usatch contends that any defamation was *de minimus* and that Mr. Khaneja and Mr. Sparling should be awarded either nominal or minimal damages. Mr. Usatch cites the following cases:

a) In *Woldu v. Desta*, [1998] 170 Sask. R. 18; 1998 CanLII 14065 (SK KB), the plaintiff was a housekeeper in a nursing home. While the defendant (whose wife was also a housekeeper) told several other nursing home employees that the plaintiff had five or six convictions. The court found his statements were slander *per se*, but there had been no damage to the plaintiff's reputation as her co-workers continued to think highly of her. The plaintiff was awarded $1000 in general damages, which the court described as "a relatively nominal award".

b) ln *Maietta v. Bennett*, [1988] 72 Nfld. & P.E.I.R. 185; 1988 CanLII 5551 (NL SC), the defendant labelled the plaintiff an unchaste troublemaker. The only person who heard the defendant's statement was a friend of the plaintiff, and he testified it had no adverse impact on his good view of the plaintiff. The court held that no serious or lasting harm had been done to the plaintiff's reputation and awarded $100.

[395] Taking all of the factors into account, I would award the individual plaintiffs $25,000 each as general damages for defamation.

XV. DISPOSITION

[396] Accordingly, I order as follows:

a) Four Top's claim against Olde Towne for breach of contract with respect to the Lease is allowed.

b) Four Top is awarded general damages against Olde Towne in the amount of $450,000 as expectation damages reflecting loss of opportunity to sublease.

c) Four Top is awarded $100,000 in punitive damages against Olde Towne in relation to Olde Towne's breach of the Lease.

d) Four Top is entitled to repayment from Olde Towne of the $9000 damage deposit paid by CRAM under the Lease.

e) Four Top's tort claims against the defendants are dismissed.

f) Mr. Khaneja and Mr. Sparling's defamation claims are allowed as against Mr. Usatch.

g) Mr. Khaneja and Mr. Sparling are awarded $25,000 each against Mr. Usatch as damages in respect of the defamation.

h) Olde Towne's counterclaim is dismissed.

[397] The plaintiffs have been substantially successful in the litigation, but sought leave to provide further submissions on costs following reasons for judgment on the trial. Any further submissions on costs should be forwarded through the Registry as written submissions, with the plaintiffs providing their submission within two weeks of these reasons and the defendants responding within two weeks from date of the

plaintiffs' submissions. The question of whether a hearing will be held will be determined by the Court following review.

"Tucker J."