SUPREME COURT OF NOVA SCOTIA
Citation: *R & D Holdings Ltd. v Buranello and French*, 2021 NSSC 359

Date: 2021-12-23
Docket: Ken. No. 510718
Registry: Kentville

Between:

R & D Dunham Holdings Limited, a body corporate

Applicant

v.

Robert Buranello and Astrid French

Respondents

Judge:	The Honourable Justice Gregory M. Warner
Heard:	December 8, 2021 at Windsor, Nova Scotia
Oral Decision:	December 8, 2021
Counsel:	Jonathan Cuming, for the Applicant Michael Mackenzie, for the Respondents

BY THE COURT:

Introduction

[1] The Applicant landlord, by Application in Chambers seeks an order declaring that a commercial lease with the Respondents ("Winegrunt" restaurant and bar) expires on December 14, 2021.

[2] This is an oral decision given today because December 14, 2021 is next week. It will be inarticulate. I may produce a written version. If I do, it will be edited for grammar and composition to make it more readable. In doing so, I will not change any reasons, results or determinations of fact or law.

[3] The issue before the court, fundamentally, comes down to an interpretation of paragraph eight - option to renew, in a lease signed between the parties commencing December 15, 2020. In a written decision I will start off by reproducing Paragraph eight and eleven. They read:

> 8 Option to Renew
> Provided that the Tenant has consistently maintained this lease in good standing during the initial term, and is not then in default under the lease, the Landlord grants that the tenant
>
> ☒ has
> ☐ does not have
>
> the option to extend the lease for a one year fixed term as agreed upon by the landlord and the tenant if exercised 3 months prior to the end of the term. Any continuation of the tenancy at the end of the term requires written consent of the Landlord, in the form of a new lease. At the end of the fixed-term, the tenancy is finished and the tenant must vacate.
>
> 11 Rent increases
> The Landlord shall not increase the rent under this lease for fixed term.
> The rent may be increased on any date and for any amount after the fixed term has expired.
> The landlord must give written notice to the tenant of an increase 4 months before the effective date of the increase. Rental increases are determined by the Landlord, in their sole discretion, not to exceed 20% of the base rent.

Principles of contract interpretation

[4] As I indicated in one of my exchanges with Mr. Cuming, the law with respect to contractual interpretation is the common law that has evolved over many years. In 2014, the Supreme Court of Canada, after not dealing with contract interpretation for some time, released two relevant decisions.

[5] In **Sattva Capital Corporation v Creston Moly Corp**, 2014 SCC 53, (**Sattva**) the court rejected a centuries old principle that contractual interpretation is a question of law. The court held it to be a question of mixed fact and law. It also rejected the principle from **Eli Lilly & co v Novopharm**, [1998] 2SCR 129, that one does not look outside the words of the contract to interpret it unless an ambiguity exists. As I wrote in **B.C. Rail Partnership v Standard Car Truck Company**, 2009 NSSC 240, English case law and some Canadian Appellate Courts had modified the common law. These courts stated that words do not have meaning in isolation. Words should be interpreted in their factual context. The English law had evolved through **Prenn v Simmons**, [1971] 3AER 237 (HL),

Reardon Smith Line v Hansen-Tangen, [1976] 3AER 570 (HL), and **Investors Compensation Scheme v West Bromwich**, [1997] 1 WLR 896 (HL). They held that evidence of the factual matrix (with some exceptions, such as the subjective intentions of the parties) should be considered. They widened the scope in which parol evidence could be admitted in aid of contract interpretation. Interpretation became a question of fact and law, not a question of law.

[6] In November of 2014 the Supreme Court of Canada went all-in. **Bhasin v Hrynew**, 2014 SCC 71, recognized the organizing principle of good faith underlying all Canadian contract law. Before it had been a piecemeal principle applied in some circumstances but not always, and with different foundations, and sometimes without a principled foundation. The decision basically rationalized and unified the law on the principle that there is a general obligation of good faith by all parties to a contract. The boundaries to which the obligation of good faith apply are not fixed but are evolving. However, the organizing principle of good faith underlies all contract law, including the interpretation of contracts.

[7] Geoff R Hall in his text, *Canadian Contractual Interpretation Law*, third edition, which I have relied upon as a guide in almost every contract interpretation case I determined since his first edition of 2007, sets out eight fundamental principles that he calls fundamental precepts of contractual interpretation. In his eight precepts or principles. Hall advocated for what **Sattva** and **Bhasin** later held.

[8] The eight precepts are relevant to the interpretation of paragraph eight of the lease; therefore, I quote from, and/or summarize the relevant principles as my guide.

[9] First, contractual interpretation is for the most part an exercise in giving effect to the intentions of the parties. In doing so it is of paramount importance to achieve accuracy in interpretation. There is little point in giving effect to the intentions of the parties if the court has not accurately discerned what the intentions are. Accuracy in interpretation requires consideration of two things, namely, the words selected by the parties to set out in their agreement and the context in which the words have been used . . . The interpretation of a contract always begins with the words it uses . . . Effect must be given to the intention of the parties to be gathered from the words they have used . . . the goal is the determination of the parties' intent at the time of entry into the contract. That state of mind is ascertained by reference to the meaning of the words used by the parties . . . The words of a contract must always be the starting point for interpretation . . .

Context is always important in discerning meaning accurately. . . Context has two separate aspects . . . first is the context of the document. The second is the surrounding circumstances that gave rise to the contract. . . Words are never used in isolation . . . there is always a background to a contract. . . the background is essential to discern the meaning of the words.

[10] Second, a contract is to be construed as a whole with meaning given to all its provisions. Individual words and phrases must be read in the context of the entire document. ***The corollary of this principle is the precept that meaning must be given to all the words in a contract. The Court should strive to give meaning to the agreement and reject any interpretation that would render one of the terms ineffective. Words in a contract are presumed to have meaning. When a contract is read as a whole, different parts of it should, if possible, be reconciled with one another so as to eliminate inconsistencies, provided that doing so does not result in an absurdity. While there are apparent inconsistencies between different terms of a contract, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in questions***.[*Court's emphasis*]One of the examples I highlighted in my review for today was a case called **Hillis Oil & Sales v Wynn's Canada**, a 1986 Supreme Court of Canada decision[[1986] 1 S.C.R. 57].

[11] The third precept is that the factual matrix constitutes an essential element of contractual interpretation in all cases even where there is no ambiguity in the language. Again, that refers back to the English cases of **Prenn v Simmons**, **Reardon Smith Line** and **Investors Compensation Scheme**. The factual matrix is but one part of the context of a contract, the other being the overall language of the document. The factual matrix clearly includes what an American judge Benjamin Cardozo called "the genesis and aim of the transaction". The factual matrix includes more than simply the purpose of the contract. The matrix is sometimes described as the background. That background is relevant as it relates to the time of the contract. It does not include evidence of negotiations leading up to the final contract, or the subjective intentions of the parties. **It consists only of the objective facts known to the parties at or before the date of contracting, it also consists only of what is common to both parties.**[Court's emphasis]

[12] The fourth precept is the organizing principle of good faith and the duty of honest performance, described in **Bhasin.** As noted above, this principle changed contract interpretation law in a fundamental way. It recognized the organizing principle of good faith in contract law, and the honest performance of the

obligations. Specifically, if the option to renew in paragraph eight of this contract is not on its face an option or a right granted by the landlord, but rather, a right of first refusal (I find it to be an option), then the fourth precept obligates the grantor to negotiate in good faith and not defeat it by acting in bad faith. It is contrary to Mr. Cuming's submission to the effect that the applicant had no obligation to negotiate in good faith an option to renew or, if I am wrong, a right of first refusal.

[13] Hall also writes that, while acknowledging that there is not unanimity in the case law to this point, there is a duty of good faith respecting negotiation within the confines of an existing contract. In this case we have at least one of the terms of the lease itself containing an option to renew and the landlord's option to increase the rent during the renewal term. I have run across many circumstances involving legal documents, such as leases or agreements to buy, where separate agreements would grant options and other rights. In this case the option to renew and the rent adjustment clause were both incorporated in the lease. This affects the interpretation of the option to renew provision in the lease.

[14] The fifth principle is that the goal of interpretation is to discover objectively the parties' intention at the time the contract was made. The exercise is not to determine what the parties subjectively intended, but what a reasonable person would have objectively understood from the words in the document, read as a whole and from the factual matrix.

[15] The sixth principle is commercial efficacy. It is a fundamental precept that commercial contracts must be interpreted in accordance with sound commercial principles and good business sense. Where one possible interpretation would allow the contract to function and meet commercial objective and the other scarcely will, the former is to be chosen. An interpretation which is commercially absurd is to be avoided. Commercial reasonableness is not determined from the perspective of only one of the contracting parties.

[16] Mr. MacKenzie submitted that paragraph eight in the lease, appeared to be a cookie cutter clause. He highlighted its wording: "Provided that the tenant has consistently maintained this lease in good standing during the initial term, and is not then in default under the lease, the Landlord grants that the tenant . . . [then the document has two boxes: the first says "has" and there is an "X" in that box, and the second says "does not have" and that box is blank.] . . . the option to extend the lease for a one year fixed term. . ." I conclude that the words in the second sentence: "Any continuation of the tenancy at the end of the term requires the

written consent of the Landlord in the form of a new lease." do not directly make the exercise of the tenant's option to renew subject to the landlord's unrestricted right to void the option granted in the first sentence. I asked Mr. Cuming whether the second sentence in paragraph eight was ambiguous. He referred to Mr. MacKenzie's analysis effectively agreeing with him that it was not ambiguous. To my mind that sentence is extremely ambiguous. The effect of giving it the meaning that Mr. Cuming asked the Court to give it, is not in accord with sound commercial principles and good business sense. When a landlord grants a right, a contractual right, in a lease to allow the tenant to renew the lease for a year, that grant creates an open-ended, non-retractable offer, which the tenant may or may not accept. That is the clear commercial sense of options to renew. To interpret the second sentence, which I conclude is ambiguous as to what it is referring to; that is, requiring the written consent of the landlord that it may refuse for any or no reason, makes the grant of the option meaningless. I am not sure from what precedent or fill-in-the-blank form the lease in this case might have been drawn, but the second sentence is ambiguous as to what it is referring to in the context of the lease as a whole, and the factual context in this case. To interpret it as proposed by the applicant would create a commercial absurdity, which is to be avoided. It was one of the important principles that affects my interpretation.

[17] The seventh principle is "every effort should be made to find a meaning". Mr. Cuming cited a sentence from the Empress decision [**Empress Towers v Bank of Nova Scotia,** 1990 CarswellBC 226 (BCCA)] to support a submission, with which I agree, that it is not the Court's duty to create and impose a contract on the parties. But commercial certainty is an contractual interpretative principle, and the cited sentence does not negate the court's obligation to make every effort to find a meaning. This principle directs the Court to avoid, if possible, finding a contract to be void for uncertainty. At the same time the effort to find a meaning must not go so far that the effect is to have the Court write a contract for the parties. The rule has two distinct elements: first, the Court must be hesitant to come to the conclusion that it is not possible to describe any meaning to the contract; second, while searching for a possible meaning, the Court should refrain from imposing a contract on the parties which would not accord with their actual intentions. This was dealt with by the Supreme Court in the **Hillis Oil** decision that I referred to a few minutes ago. Geoff Hall expands on both of those elements in his description of the seventh precept, and I adopt his analysis.

[18] The eighth fundamental precept is that the contract is to be interpreted as of the date it was made. I am not going to say more on that. I referred to it earlier.

Whatever the applicant Landlord determined to do with the leased building after the execution of the lease, and whatever caused it to make an offer to the Respondents to terminate their lease early, is not relevant. It is clear that on June fourth, the Respondents emailed the Landlord that they declined the offer of early termination of the lease and opted to renew it per paragraph eight of the lease. It is the parties' intention in December, 2020 (when the lease was signed) that is the relevant factual matrix.

[19] Chapter three in Hall's text lists 22 other or supplementary interpretive rules and principles. Many of them I will skip because they do not apply to the factual circumstances here.

[20] The first is the parol evidence rule. As noted at the beginning of this decision, some but not all parol evidence respecting the factual matrix is permitted.

[21] The second was the *Contra Proferentem* rule, which I am not sure applies, even if the lease was prepared by the Landlord. I agree that the landlord should not have the benefit of any ambiguity, but I don't think the tenant should either. The *Contra Proferentem* rule is only to be applied as a rule of last resort. I do not have to go that far.

[22] Principle three deals with the use that can be made of prior drafts. No prior drafts are in evidence. Principle four, five and six are not relevant to this case.

[23] Principle seven is worthy of note: Parties are presumed to intend the legal consequences of their words. Contracting parties are presumed to intend the legal consequences of the words used. The effect of this presumption is two fold: first, it reinforces the focus of the interpretive exercise on the words chosen by the parties to form their contract; second, it reduces the scope of admissible extrinsic evidence.

[24] The twelfth principle is that previous decisions interpreting contractual language are persuasive in assisting the Court engaged in the exercise of contractual interpretation, but they are not decisive. Interpretation of a standard form contract is more likely to be governed by precedent. Leases are generally standard. I am not sure there is anything magic about the lease that is the subject of this proceeding (or that the wording of the leases in the case law provided are similar to this lease).

[25] The sixteenth principle is called ‘commercial certainty’. It is relevant to the court’s analysis. It is widely accepted that business people generally regard uncertainty as undesirable. As a result, certainty is an important policy goal in any aspect of the law that governs commercial relations. In choosing between competing interpretations of a contract, the interpretation which better promotes commercial certainty ought to be preferred. This approach is justified as furthering the intentions of the parties, since it is axiomatic that one of the purposes of entering into a written contract is to achieve certainty of one’s contractual obligations and entitlements. The sixth and seventh fundamental precepts overlap this principle, and support the idea that promotion of commercial certainty is a sound principle.

[26] Geoff Hall spends a lot of time in the seventeenth supplementary principle dealing with the consequences of adoption of the modern approach by the **Sattva** decision. The **Sattva** principles are consistent with the precepts and principles described in Hall’s text referred to and relied upon in this decision.

[27] In chapter nine (9.16), he deals with an issue respecting options. He refers to **Irving Industries**, a 1975 SCC decision [*Canadian Long Island Petroleums Ltd. v. Irving Wire Products,* [1975] 2 S.C.R. 715], for a description of the general nature of an option. The primary issue identified by Hall arose from **Sail Labrador v Challenge One**, [1999] 1 SCR 265. Until the **Sails Labrador** decision, courts most often described an option to be a unilateral contract, part of another contract in which the optionor granted a right, a contractual right, to the optionee to exercise the renewal of a lease or the purchase of property, or whatever other right was given, as a single contract. In **Sails Labrador** the allegation was that there had been default in paying lease payments on time by the lessee during its lease of a vessel, which default was used as a reason by the vessel owner to claim forfeiture of the lessee’s option to purchase the vessel. The Supreme Court upheld the trial judge’s decision that time was not of the essence respecting payment of lease payments and declared that the lessee was entitled to exercise the option. In upholding the trial judge, the Supreme Court described the legal status of an option and interpreted the charterparty agreement and enforced what it described as the true intentions of the parties as revealed by all of the circumstances and applicable policy reasons. Most of the legal writers I cited during counsel’s submissions have suggested that sometimes bad facts make bad law, but the effect of that decision on the interpretive principles was limited to whether an option was one contract or two contracts. Hall suggests the analysis in that case was artificial. I concluded that it has no impact on the interpretive process that we are dealing with today.

Analysis

[28] On September 25, 2018, the Respondents signed a lease with the prior owner of the property, for a term starting October 15, 2018 and ending on December 14, 2020. A copy is attached to Mr. Buranello's affidavit as Exhibit A. Sometime after that lease was signed the Applicant purchased the property. The original lease gave the tenant an option to renew the lease for further term of one year upon expiration of the initial term with an increase in the rent of four percent.

[29] It is clear from the affidavits filed with the Court that, at some point after the Applicant acquired the property, it advised the Respondents that it was not prepared to renew the existing lease, and instead required a new lease to be signed. The affidavits filed do not contain copies of drafts of the Applicant's proposed new lease, but they do contain email exchanges between the parties leading up to the new lease.

[30] The end result was execution of the lease attached as Exhibit "D" of Mr. Dunham's affidavit. That is the lease that the Court is asked to interpret.

[31] The substantive terms of the September 2018 and December 2020 leases are similar, other than additional words in paragraph 8 (option to renew paragraph) and the entitlement to a rent increase on renewal in paragraph 11 of the December 2020 lease. They are not identical. They clearly contain different wording. The September 2018 lease looks like it was prepared as a commercial lease for and by the then landlord. The four blank spaces completed in writing related to the date of the lease, the name of the tenant, the term, and the calculation of the square footage, rent per square foot and monthly rent. The December 2020 lease appears to be a fill in the blank form of lease from paragraph 1 to paragraph 30B. Some of the paragraphs are blank because they are not relevant to the factual matrix. Clearly most of the paragraphs have spaces to fill in particulars that the parties choose to populate.

[32] The option to renew paragraph - paragraph one in the first lease and eight in the second lease, are similar except that in the first lease it is not a fill-in-the-blank form that requires the parties to choose the appropriate option. The first lease reads: "the Landlord hereby grants to the Tenant the option to renew . . .". The second lease reads: "the Landlord grants that the Tenant has or does not have [two boxes to choose from] an option to extend the lease for a one year fixed term . . .". The second lease adds a second and third sentence; the third sentence in paragraph eight affects my interpretation of the first and second sentences. There would be no

reason for the third sentence in the option to renew if the first sentence did not grant a right to renew. If (as submitted by the Applicant) the second sentence effectively withdrew or negated the contractual right given to the tenant to renew in the first sentence, the third sentence, which reads: "At the end of the fixed term the Tenancy is finished and the Tenant must vacate", would serve no purpose. Clearly the existence of the third sentence is consistent with the granting of a right to extend the lease for a one year fixed term. It is inconsistent with the option to renew in the first sentence, to then interpret the second sentence as making that right subject to the absolute right of the landlord to say "no" for any reason it determined. The Applicant's interpretation would render the option to renew meaningless, contrary to one of the fundamental precepts of contract interpretation. It is an absurd interpretation. The lease of December, 2020 contains all of the terms necessary for an extension of the lease for a one year fixed term. It sets out the parties' respective rights and responsibilities. It sets out the rental amount, and the term. It describes the landlord's entitlement to a rent increase during the one year extension, provided the Landlord gives four months notice and the rent increase is not more than twenty percent. All of the terms of a lease are in the December 2020 lease. To interpret the second sentence of paragraph eight as giving that the Landlord a right to change the terms of the existing lease without regard to the existing contract would create commercial uncertainty, and would not promote commercial efficacy.

[33] Leases to rent commercial businesses imply some permanency. Unlike leases related to a mobile home or a car, and apparent from the affidavits, the tenants have invested considerably in Tenant's improvements for their use and purpose. To interpret the Lease as being transient in nature contradicts the principles of commercial efficacy and commercial certainty.

[34] Sometimes agreements contain words to the effect that a party to an agreement has to consent to something. Most often they imply, or expressly state, that consent cannot be unreasonably withheld. Those words existed before **Bhasin**. The effect of the **Bhasin** decision is to incorporate, as a principle a new duty to perform contractual obligations in good faith. I do not interpret the second sentence in paragraph eight as entitling the Landlord to unilaterally change all the terms of the lease to its advantage, or fundamentally change the nature of the existing lease. I do not suggest that there cannot be some factually based circumstances that might affect the operational terms of the Lease. The second sentence in paragraph eight does not justify changing the Lease significantly. The only term of the Lease that was intended to be subject to change upon renewal was

the negotiation limiting any rent increase to twenty percent. Presumably that and any other change would depend upon the commercial circumstances in downtown Windsor at the time of the renewal.

[35] This court's decision is not an order that the right to renew exercised by the Respondents on June 4th, 2021, is subject to entering into a lease the terms of which are unilaterally determined by the Landlord. Commercial Efficacy would imply a lease similar to the lease that exists except for those provisions which the parties negotiated. The mutual intentions of the contracting parties at the time the lease was entered into, not the subjective intentions of the landlord communicated after the lease was entered into, are material to my interpretation of paragraph eight of the December 2020 lease. Commercial circumstances that occurred subsequent to the parties entering into the Lease, which may be the subjective intentions of one of the parties, but which were not the objective joint intentions of both parties, are not material.

[36] I deny the landlord's application for a declaration that the Respondents have no rights to the leased premises after December 14, 2021. The Respondents gave the proper notice to exercise the option to renew, and it is not challenged that at the time they gave the notice, they were not in default. I do not rule that a new Lease cannot be presented to the tenant for the extension. I do not impose any terms except to state that I interpret the intentions of the parties at the time of the signing the December 2020 Lease as intending that, if the option to renew was exercised, it would, except for rent, be on similar terms to those that existed in the December 2021 lease.

Warner, J.