

Court of Queen's Bench of Alberta

Citation: 550 Capital Corp v. David S. Cheetham Architect Ltd., 2008 ABQB 370

Date: 20080623

Docket: 0701 02069

Registry: Calgary

Between:

550 Capital Corp.

Appellant/Applicant

- and -

David S. Cheetham Architect Ltd., Craig A. Webber Architect Ltd., Patrick Romerman Professional Engineer Ltd., RGM Drafting Ltd., Nancy Vruwink Consulting Ltd., operating as Group 2 Architecture Engineering Interior Design; and Group 2 Architecture Engineering Ltd.

Respondents/Respondents

**Reasons for Judgment
of the
Honourable Mr. Justice A.G. Park**

Appeal from the Order by
Master L. Alberstat, Q.C., in Chambers
Dated July 5, 2007

[1] 550 Capital Corp. ("550") brought an application before the Master in Chambers on July 5, 2007 for an order enforcing the rights of 550 as the Applicant Landlord and providing it with possession of the leased premises located at Suite #607, 550 11th Avenue SW in the City of Calgary in the Province of Alberta.

[2] The application was opposed by the Respondent Tenants, David S. Cheetham Architect Ltd., Craig A. Webber Architect Ltd., Patrick Romerman Professional Engineer Ltd., RGM Drafting Ltd., Nancy Vruwink Consulting Ltd., operating as Group 2 Architecture Engineering Interior Design (the “Partnership”). A further Respondent Tenant opposing the application was Group 2 Architecture Engineering Ltd. (the “Corporation”).

[3] The learned Master dismissed the application on the basis that the Lease between the Landlord and the Tenants (the Partnership) contained 2 clauses which were inconsistent with each other. As a result he struck one clause (Article 10.03 of the Lease) from the Lease. He allowed the other clause (Article 10.02 of the Lease) to remain in the Lease. Clause (Article 10.03) was the Clause upon which the Landlord relied to terminate the Lease. Without Article 10.03 being contained in the Lease and being enforceable under the laws of the Province of Alberta, the Master subsequently determined the Landlord had no basis to terminate the Lease.

[4] 550 appealed the Order of the Master on the following grounds:

1. The Master erred in law in his interpretation of the Lease;
2. The Master erred in law in holding that Article 10.03 of the Lease was inconsistent with Article 10.02 of the Lease and that Article 10.03 of the Lease was therefore unenforceable in law;

[5] In its appeal under Rules 410 and 500 of the *Alberta Rules of Court* 550 sought an Order declaring the following:

1. Article 10.03 of the Lease to be valid and enforceable under the laws of Alberta;
2. That the Appellant/Applicant validly invoked its rights as Landlord under Article 10.03 of the Lease when it elected to terminate the Lease Agreement with effect on 31 March 2007;
3. The Lease to be to validly terminated with effect on 31 March 2007;
4. Granting to the Applicant Landlord immediate vacant possession of the leased premises or on such other date as this Honourable Court may select;
5. Granting to the Applicant Landlord its costs of the present appeal/application and the application before the learned Master on such other basis as this Honourable Court deems just; and
6. Granting such further and other relief as the situation may require and this Honourable Court deems just.

Facts

[6] On January 6, 2005 ACM Project 50 Ltd. as Landlord and the Tenant Respondents (the Partnership) executed a written Lease for premises located at Suite 607, 550 11th Avenue, SW in the City of Calgary (the “premises”). The Partnership occupied only one suite in the building. Other separate tenants occupied the balance of the suites in the building.

[7] On July 28, 2005 ACM Project 50 Ltd. Assigned the Lease to 550. On or about June 27, 2005 each of the Tenant Respondents (the Partnership) signed an estoppel certificate for Strategic Equity Corp. and its successors and assigns at the request of Strategic Equity Corp. Strategic Equity Corp. is part of the Strategic Group of Companies (“Strategic”) who assist in the management of the premises on behalf of 550.

[8] On February 16, 2006 the business manager for the Respondent, Group 2 Architecture Engineering Ltd. (the Corporation) wrote a letter on the Corporations’s letterhead to 550 advising the Partnership incorporated on January 1, 2006 and became Group 2 Architecture Engineering Ltd. She further advised in the letter that the Tenant Respondents (the Partnership) had retained a 100% ownership and that control of the firm had not changed. This advice contained no indication that the Partnership was assigning or transferring the Lease to the Corporation. She advised 550 that if it required further information it could contact her. 550 did not specifically respond to this letter.

[9] Although the Corporation did not advise 550 of the details of the incorporation, the Partnership transferred all its assets including the Lease to the Corporation. In exchange for the asset transfer all the partners in the Partnership received shares in the Corporation and notes evidencing the Corporation’s debt to the partners in the aggregate amount of \$381,998.99. Further the Partners believed the Corporation became the sole tenant of the premises, with full possession, title and interest in the premises. The Partners did not believe they had assigned the Lease to the Corporation because there was no change in each of their control from the Partnership to the Corporation. As a result of this belief no request was made of 550 or Strategic to consent to an assignment of the Lease.

[10] Between May 29, 2006 and August 15, 2007 Strategic and 550 wrote a series of letters to the Respondent Tenants (the Partnership). The first letter sent by Strategic dated May 29, 2006 was addressed as follows:

“All the tenants of the lease between ACM Project 50 Ltd. and the group operating as Group 2 Architecture Engineering Ltd.”

[11] A second letter from Strategic of June 29, 2006 contained the identical addressees.

[12] On December 20, 2006 550 addressed an invoice for common area costs as follows:

“o/a Group 2 Architecture Engineering Ltd.”

[13] On December 22, 2006 Strategic sent that invoice of 550 in a letter addressed as follow:

“o/a Group 2 Architecture Engineering Ltd.”

[14] On January 15, 2007 Strategic sent a letter re: a parking stall rate increase to:

“All the tenants of the lease between ACM Project 50 Ltd. and the group operating as Group 2 Architecture Engineering.”

[15] On March 1, 2007 and August 15, 2006 550 sent rental invoices as follows:

“o/a Group 2 Architecture Engineering Ltd.”

[16] On February 22, 2007 Strategic sent a letter addressed to Group 2 Architecture Engineering Ltd.

[17] Finally on August 15, 2007 Strategic sent a letter addressed to Group 2 Architecture Engineering Interior Design. This letter enclosed a rental invoice dated August 16, 2007 generated by 550.

[18] On November 6, 2006 Strategic wrote a letter to all the tenants of the building at 550 - 11th Avenue SW in the City of Calgary. It requested each tenant execute an enclosed Tenant Estoppel Certificate and return it by November 8, 2006 to Strategic. This new Tenant Estoppel Certificate was required immediately to allow 550 to re-finance the building. Time was of the essence in the re-financing. The Tenant Estoppel Certificate referred to each of the Respondents (the Partnership), carrying on business as Group 2 Architecture Engineering Interior Design. The Tenant Estoppel Certificate did not reference Group 2 Architecture Engineering Ltd. as a tenant.

[19] On November 2, 2006 the Respondent, Group 2 Architecture Engineering Ltd., sent a letter to Strategic returning the executed Tenant Estoppel Certificate with the name of each of the Respondents (save and except Group 2 Architecture Engineering Ltd.) struck out. Group 2 Architecture Engineering Ltd. was added in handwriting to replace the Partnership name as the tenant. The letter further referenced a telephone call made by the Respondent to the property manager of Strategic asking for her permission to make that change to the Tenant Estoppel Certificate. Because of the required urgency to receive the completed Tenant Estoppel Certificate, the property manager agreed to the request to change the name of the tenant to reflect the incorporation of Group 2 Architecture Engineering Ltd. In that letter the Respondent, Group 2 Architecture Engineering Ltd., enclosed a copy of the Certificate of Incorporation for itself. The Tenant Estoppel Certificate was executed by the president, Patrick Romerman, of Group 2 Architecture Engineering Ltd.

[20] The amended Tenant Estoppel Certificate and the letter of the Respondent Corporation came to the attention of general legal counsel for Strategic near the end of December, 2006. As a result Strategic sent each of the Respondents, the Partnership, (save and except the Respondent

Corporation) a letter dated January 3, 2007. In the letter Strategic referred to its review of the following documents:

1. Lease with Tenant being David S. Cheetham Architect Ltd., Craig A. Webber Architect Ltd., Patrick Romerman Professional Engineer Ltd., RGM Drafting Ltd., jointly and severally, and operating as Group 2 Architecture Engineering Interior Design (the "Lease");
2. Letter dated February 16, 2006, disclosing the incorporation of Group 2 Architecture Engineering Ltd.
3. Letter dated November 6, 2006 attaching an estoppel signed by Group 2 Architecture Engineering Ltd. and a Certificate of Incorporation;
4. Cheques dated March 1, 2006 and every month thereafter from Group 2 Architecture Engineering Ltd. for the payment of rent.

[21] As a result of its review Strategic concluded in its letter that the Partnership was treating the Lease as being assigned to the Corporation. Strategic referenced Article 10.02 of the Lease and noted that Article indicated the tenant shall not assign the Lease without the prior written consent of the Landlord. Strategic noted no request for assignment was received by the Landlord and further no consent to an assignment was provided. As a consequence Strategic advised the Partnership to construe its letter of January 3, 2007 as a notice of default under Article 10.07 of the Lease. It further advised if the Partnership did not cure such default within 15 days, the Landlord shall be entitled to terminate the Lease and re-enter the Premises.

[22] As a result of the letter the Respondent Corporation retained legal counsel. In a letter dated January 5, 2007 to Strategic, counsel for the Corporation pointed to the letter of the Corporation of February 16, 2006 wherein it advised 550 of the incorporation of the Partnership, and further advised the Partnership had retained 100% ownership of the firm, and as a result control of the firm had not changed. Counsel for the Corporation further referenced the exchange of documents between the Landlord (550 and Strategic for the Landlord) and the Tenant (the Partnership and the Corporation) since February 16, 2006. Counsel for the Corporation disagreed that there had been an assignment of the Lease as the shareholders of the Corporation were precisely the same as the parties of the Partnership who executed the Lease as Tenants.

[23] On January 5, 2007 Strategic wrote to counsel for the Corporation and advised its position was that the Partnership had assigned the Lease. By letter of the same date counsel for the Corporation replied to Strategic and again pointed out because the parties to the Lease and the shareholders of the Corporation are one and the same, there had been no change in control and accordingly no assignment.

[24] On January 8, 2007 Strategic by letter to the Corporation's counsel noted prior to the assumption of the Lease by the Corporation, the Landlord had the covenant and assets of 4 different legal entities to backstop the legal and financial obligations of the Tenants under the

Lease. After the assumption of the Lease by the Corporation, Strategic noted the Landlord now was restricted to the one covenant of the Corporation as the Tenant.

[25] Strategic reiterated the Landlord was treating the Lease as having been assigned without the Landlord's consent. It further noted unless this default was cured on or before January 19, 2007, the Landlord would be entitled to exercise its remedies pursuant to the Lease, including termination.

[26] On January 12, 2007 a telephone call took place between the respective counsel. As a result Counsel for Strategic faxed a letter to the Corporation's counsel on that same date wherein a request was made to have the Partnership seek the Landlord's consent to the assignment in accordance with the Lease.

[27] On January 17, 2007 counsel for the Partnership and the Corporation wrote a letter to Strategic disputing the Landlord's notice of default contained in the correspondence of January 3, 2007. The letter reiterated the denial that the Lease had been assigned because there was no change in control in the Tenant. Again it pointed out that the firms comprising the Tenant as the Partnership were now the majority shareholders of the Corporation as the Tenant. It further pointed out the individual partners remained liable, as does the Corporation, for the obligations under the Lease.

[28] However, the letter concluded, despite the Landlord's characterization of the incorporation as an assignment of the Lease and, in an effort to resolve the Landlord's concerns, the Partnership Tenant requested the Landlord's consent to an assignment of the Lease from the Partnership to the Corporation.

[29] On January 18, 2007 counsel for Strategic faxed a letter to counsel for the Partnership and the Corporation advising the position of the Landlord remained unchanged. Further it went on to advise that the Landlord, pursuant to Article 10.03 of the Lease, gave notice of the cancellation and termination of the Lease effective March 31, 2007. The Tenants were instructed to surrender the premises on or before March 31, 2007.

[30] I note the letter of Strategic of January 18, 2007 refusing the request for the assignment of the Lease, and in turn cancelling and terminating the Lease, took place one day before the date of January 19, 2007. January 19, 2007 was the date the Landlord in its correspondence of January 8, 2007 demanded the Partnership Tenants cure the default occasioned by the Lease having been assigned without the Landlord's consent. I further note the cancellation and termination of the Lease under Article 10.03 did not at January 18, 2007 deprive the Tenants of their right to cure the default occasioned by the Lease having been assigned without the Landlord's consent, as identified by the position adopted by the Landlord in Strategic's correspondence of January 8, 2007.

[31] By correspondence to Strategic dated January 19, 2007 counsel for the Partnership and the Corporation objected to the notice provided under Article 10.03 of the Lease as set out in Strategic's correspondence of January 18, 2007.

[32] The Tenants did not vacate the premises on or before March 31, 2007. The Tenants remain in the premises at present under their claim to entitlement to quiet possession in accordance with the Lease.

[33] In turn Strategic provided a further notice of default to the Partnership Tenants on February 10, 2007 wherein the Landlord alleged the Partnership Tenants have refused to allow the Landlord to show the premises to prospective tenants under Article 5.12 of the Lease.

[34] On February 20, 2007 counsel for the Partnership Tenants by correspondence to Strategic disagreed that the Tenants are in any default under the Lease. Again, counsel for the Tenants demanded the Tenants' right to quiet possession and made the further assertion that the Landlord had no right to show the leased premises to prospective tenants when the Lease was not in default.

[35] As a result of this impasse the Landlord brought its application to this Court.

Assignment

[36] The Tenants argue the transfer of the Lease from the Partnership to the Corporation was not an assignment of the Lease because there was no effective change of control as the Partner Tenants in effect are the majority and controlling shareholders of the Corporation. However, the Corporation was a new legal entity. There was no doubt that the Partnership unconditionally transferred the Lease and all its rights and interests thereto to the Corporation. The Partnership Tenants executed a formal assignment agreement transferring their property, including the Lease, to the Corporation. The Corporation acknowledged in these proceedings, through the evidence of its business manager, that it enjoyed all right, title and interest to the leased premises. Further since March, 2006 the Corporation paid rent to the Landlord by providing cheques drawn on the Corporation's bank account. While the Tenants argue that the provision of those cheques should have placed the Landlord on notice that the Lease had been assigned, I note the cheques of the Partnership Tenants and subsequently the Corporation were very similar in format and appearance. In my view the mere provision of the Corporation's cheques after March, 2006 would not be sufficient to alert the Landlord of an assignment of the Lease to the Corporation. In the case at bar the Lease was transferred to a new legal entity, the Corporation, by the Partnership. The Corporation was not a party to the original Lease. Further by the assignment (transfer) the Corporation received the contractual rights and obligations under the Lease. See G.H.L. Fridman, Q.C., *The Law of Contract in Canada*, 5th ed. (Toronto:ThomsonCarswell, 2006) at page 678.

[37] Initially Strategic in its letter of January 3, 2007 advised the Landlord was giving the Partnership notice of default under Clause 10.07 of the Lease. Clause 10.07 allows the Tenant 15 days to cure the default, failing which the Landlord shall be entitled to terminate the Lease and to re-enter the premises. Accordingly the Partnership could cure the default on or before January 19, 2007. However on January 18, 2007 the Landlord gave notice to the Partnership and the Corporation pursuant to Article 10.03 that the Lease was cancelled and terminated effective

March 31, 2007. Yet the 15 days to cure the default had not expired by January 18, 2007. The Partnership and the Corporation could still cure the default. In my opinion any proceedings under Article 10.03 cannot take effect, when the Landlord has elected to proceed under Article 10.07 (the default Article). The provisions of Article 10.03 cannot be utilized until the Tenants' 15 days of grace to cure the default have expired and the default has not been cured. Therefore in that the Landlord elected to proceed under Article 10.07 and the time within which the alleged default as established by the Landlord had not expired, the Landlord is held to proceed under its original election. The Tenants must be given the appropriate time, as established by the Landlord, to cure the default.

[38] Once the Partnership fell into default by its arbitrary non-consensual assignment of the Lease to the Corporation under Article 10.02, the Landlord elected to seek its remedy under Article 10.07.

[39] The Landlord is restricted to that remedy until the Tenants' 15 days of grace have expired. The Landlord in those 15 days of grace cannot invite the Tenant to initiate a request for the Landlord's consent to the assignment and subsequently refuse such a request, when received, in order to invoke Article 10.03 of the Lease.

[40] Further the Landlord in Strategic's letter fax of January 12, 2007 specifically invited the Partnership Tenants to request an assignment of the lease. In my view in these circumstances the Tenants can invoke the doctrine of estoppel. The doctrine of estoppel prevents the Landlord from drawing on the provisions of Article 10.03. Its conduct in inviting the Tenants to request an assignment of the Lease, caused the Tenants to reasonably believe that such a request would cure the default and the Landlord would not terminate the Lease. The representation in the letter fax of January 12, 2007 induced the Tenants to ask for the consent of the Landlord for assignment of the Lease. Without this representation the Tenants, on the evidence, would not have asked the Landlord for its consent for an assignment of the Lease. This finding of fact regarding the Tenants' lack of intent to ask for an assignment prior to Strategic's letter fax of January 12, 2007 is easily observed in the content and tenor of the Tenants' correspondence to Strategic prior to January 12, 2007. In making the request to the Landlord for the assignment of the Lease as a result of the Landlord's representation the Tenants committed an act to their detriment. This detriment is seen by the Landlord now seeking a declaration in this Court that the Lease is terminated under the Landlord's attempted invocation of Article 10.03. If the Lease is terminated, the Tenants will lose the benefit of the Lease and its attendant current economic benefits. Further if the Landlord is allowed to terminate the Lease under Article 10.03, the Tenants will be precluded from asking this Court for relief from forfeiture because of their positive act in asking for an assignment of the Lease and thereby allowing the Landlord to terminate the Lease under Article 10.03. Relief from forfeiture is not available where a landlord exercises an option to terminate a lease that is not based on a tenant's breach or default. Here the Landlord's representation induced the Tenants to ask for the consent to the assignment, which effectively was to the detriment of the Tenants. To allow the Landlord to rely on Article 10.03 in these circumstances would be inequitable.

[41] In my view the facts of this case allow the doctrine of estoppel to be invoked. The case of *Morgan v. Boles*, [1945] A.J. No. 26 (Alta. S.C.A.D.) at para. 19 sets out the essential factors giving rise to estoppel:

- 1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made.
- 2) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made.
- 3) Detriment to such person as a consequence of the act or omission.

[42] Further, the Ontario Court of Appeal has provided the following comments in relation to estoppel:

. . .a promise, whether express or inferred from a course of conduct, is intended to be legally binding if it reasonably leads the promisee to believe that a legal stipulation, such as strict time of performance, will not be insisted upon.

Owen Sound Public Library Board v. Mial Developments Ltd., 1979 Carswell Ont 643 (Ont CA) at paragraph 16.

[43] In addition to my finding that the doctrine of estoppel is applicable in these factual circumstances, I again note, once the Landlord prematurely refused the assignment request in its fax of January 18, 2007 and invoked Article 10.03, the Tenants still had time to cure the default by other means. The Landlord by its conduct never gave the Tenants an opportunity to cure the default.

[44] To invoke subsequently the provisions of Article 10.03 before the notice period that the Tenants were provided to cure the default, makes Article 10.03 not available to the Landlord until the 15 days of grace have expired without the default being cured. The Landlord must follow the provisions of Article 10.07 as selected by it.

[45] Further I am strengthened in my finding, that the Landlord having elected to proceed under Article 10.07 must continue to enforce its remedy under Article 10.07, by the judgment of the Alberta Court of Appeal in its unanimous decision in *Zurich Canadian Holdings Ltd. v. Questar Exploration Inc.*, 1999 ABCA 75. In discussing a head lease clause [Section 8.02 in that case] similar to Articles 10.02 and 10.03 of the case at bar the Court stated the following commencing at paragraph 21 to paragraphs 27 inclusive:

21 Section 8.02 Landlord's Right to Terminate

If the Tenant intends to effect a Transfer, the Tenant shall give prior notice to the Landlord of such intent specifying the identity of the Transferee, the type of Transfer contemplated, the portion of the Premises affected thereby, and the

financial and other terms of the Transfer, and shall provide such financial, business or other information relating to the proposed Transferee and its principals as the Landlord or any Mortgagee requires, together with copies of any documents which record the particulars of the proposed Transfer. The Landlord shall, within 30 days after having received such notice and all requested information, notify the Tenant either that:

- (a) it consents or does not consent to the Transfer in accordance with the provisions and qualifications of this Article VIII; or
- (b) it elects to cancel this Lease as to the whole or part, as the case may be, of the Premises affected by the proposed Transfer, in preference to giving such consent.

If the Landlord elects to terminate this Lease it shall stipulate in its notice the termination date of this Lease, which date shall be not less than 30 days nor more than 90 days following the giving of such notice of termination. If the Landlord elects to terminate this Lease, the Tenant shall notify the Landlord within 10 days thereafter of the Tenant's intention either to refrain from such Transfer or to accept termination of this Lease or the portion thereof in respect of which the Landlord has exercised its rights. If the Tenant fails to deliver such notice within such 10 days or notifies the Landlord that it accepts the Landlord's termination, this Lease will as to the whole or affected part of the Premises, as the case may be, be terminated on the date of termination stipulated by the Landlord in its notice of termination. If the Tenant notifies the Landlord within 10 days that it intends to refrain from such Transfer, then the Landlord's election to terminate the Lease shall become void.

(Emphasis added)

22. The above provisions give the landlord three options upon receiving notice of a tenant's intention to effect a Transfer. The landlord is obligated, within 30 days of receiving the notice, to notify the tenant that:
 1. It consents to the Transfer;
 2. It does not consent to the Transfer; or
 3. In preference to giving such consent, it elects to cancel the lease.
23. If the landlord elects to cancel the lease, it must stipulate the termination date. Certain rights accrue to the tenant in such instance. Importantly, the tenant can then choose to "refrain from such Transfer or to accept termination" of the lease. If the tenant notifies the landlord that it intends to refrain from the Transfer, the landlord's election to terminate becomes void.

24. It is critical to recall what happened in this case. On December 17, Roan requested Zurich's consent to the assignment to Questar Energy. Zurich replied on December 22. Its reply failed to consent or not consent to the proposed assignment. Rather, the reply asserted that Roan was in default of the Sublease because of the amalgamation (for which Zurich's prior consent had not been obtained) and because there had already been a transfer of possession of the premises without its consent. Based on these alleged defaults, Zurich stated that the lease was terminated as of January 31, 1998.
25. Much of Zurich's appeal is now based upon the argument that it was entitled to rely upon s.8.02 of the Headlease. But when it stated in its December 22 letter that the lease was terminated, Zurich never purported to be acting under s. 8.02. As such, Roan never had an opportunity to exercise its rights pursuant to that provision, namely, to decide to refrain from the proposed transfer.
26. As already stated, the assignment to which Zurich's consent was sought was conditional upon the obtaining of the requisite consents. It is not apparent that Roan was not in a position to "undo" that assignment, had Zurich made it plain, in response, that it was acting pursuant to s. 8.02 of the Headlease. Similarly, the grant of a non-exclusive licence by Roan to Questar Energy made reference to the obtaining of consents. We acknowledge that there may have been difficulties in undoing the amalgamation at that stage (always assuming that s. 8.02 applied and that the amalgamation had effected a Transfer). But that does not diminish the point that, in acting as it did, Zurich never gave its subtenant an opportunity to exercise its rights under s. 8.02.
27. Since Zurich never purported to act pursuant to s. 8.02 of the Headlease, it cannot now rely on that provision (assuming it applied to the Sublease) to justify its legal position.

[46] In applying the principles set out by the Court of Appeal to the case at bar the Tenants had certain rights accrue to them when the Landlord proceeded under Article 10.07 and invited them to cure the default. If the Tenants cured the default by January 19, 2007, as instructed by the Landlord in its letter of January 3, 2007 invoking Article 10.07, and its letter of January 8, 2007, the Landlord had no basis, subsequently, to elect to cancel and terminate the Lease under Article 10.03. The default under the Lease would have been cured.

[47] Presumably the Tenants can cure the default by having the Corporation re-assign or transfer the Lease to the original Partnership. Such a re-assignment or transfer in my view would cure the default and the Lease could not be terminated under Article 10.07.

[48] I turn my attention to the Tenants' request for consent to the assignment [as instructed by the Landlord in the Landlord's fax of January 12, 2007] of the Lease by the Landlord. This request was an attempt by the Tenants to resolve the concerns of the Landlord [see the letter of January 17, 2007 from the Tenants' counsel to counsel for the Landlord]. The Tenants qualified

their request by maintaining their position that the incorporation was not an assignment of the Lease.

[49] As an aside I do not agree with the submissions of the Tenants' counsel that the Alberta Court of Appeal decision in *Zurich* stood for the proposition that Articles, such as 10.03 in the case at bar are unenforceable or should be ignored because they are inconsistent with other terms in the lease. Rather in *Zurich* both Mason, J. and the Alberta Court of Appeal held that an Article in the Zurich head-lease similar to Article 10.03 of the Lease in the case at bar could not be relied upon by Zurich. The 2 levels of the Court found that this Article could not be relied upon, not because of some illegality or inconsistency between the clauses in the Zurich head-lease, but rather it could not be relied upon because the sub-lease entered into between Zurich and its sub-tenant contained a non-assignment clause which was inconsistent with the head-lease provisions. In this limited connection I agree with the Landlord's counsel that the *Zurich* decision is not applicable to the case at bar to demonstrate inconsistencies between Article 10.02 and Article 10.03. I agree Articles 10.02 and 10.03 are not inconsistent with each other in the case at bar. I merely find due to my earlier Reasons that the subsequent use of Article 10.03 by the Landlord is inconsistent with the earlier election by the Landlord to proceed under Article 10.07 when the default rectification period under Article 10.07 had not expired. Had the Landlord in the case at bar initially elected to terminate the Lease under Article 10.03 because of the assignment by the Partnership to the Corporation, the Landlord could under Article 10.03 exercise its contractual right to terminate the Lease. However that did not occur here. Rather the Landlord elected to notify the Tenants there was a default in the Lease and gave the Tenants a period of time to rectify the default. The default period had not expired when the Landlord made its subsequent election to terminate following the receipt by the Landlord of the Corporation's request for consent to an assignment of the Lease and which request for consent to an assignment of the lease was done at the Landlord's suggestion.

[50] Because the Tenant can cure the default by immediate re-assignment of the Lease held by the Corporation to the Partnership and because the Landlord in the circumstances is presently prevented and estopped from relying on Article 10.03 of the Lease, the appeal on the application of the Landlord is dismissed.

[51] However the Tenant must immediately complete the steps necessary to re-assign the Lease. Because of the circumstances of this case and the passage of time I will provide the Tenant with ten (10) business days after these Reasons are entered to cure the default and re-assign the Lease to the Partnership under Article 10.07. If the default is not cured in this manner and within that time, the Landlord shall be entitled to proceed under the provisions of the Lease to terminate it and re-enter the premises under Article 10.07 of the Lease.

[52] Further in the circumstances of this case I, alternatively, would be prepared to grant the Tenant relief from forfeiture. Relief from forfeiture is available where a tenant is in default under a Lease. In accordance with its letters dated January 3, 2007 and January 8, 2007 the Landlord advised the Tenants' act of assigning the Lease without the Landlord's consent constituted a default in accordance with Article 10.07 of the Lease. The Landlord gave the Tenants the opportunity to cure the default on or before January 19, 2007. The Landlord further advised the

Tenants if the default was not cured within that time period, the Landlord would be entitled to terminate the Lease and re-enter the premises. As I held earlier, the Landlord cannot exercise its option under Article 10.03 of the Lease to terminate the Lease. If the Landlord had been able to exercise its option to terminate the Lease under Article 10.03 the Lease would not be terminated on the Tenants' breach or default. Instead the Landlord elected to proceed initially under Article 10.07 and notified the Tenants their conduct was regarded as a default under the Lease.

[53] The decision of the Ontario Court of Appeal in *Maverick Professional Services Inc. v. 592423 Ontario Inc.*, [2001] O.J. No. 1877 provides guidance on the circumstances where relief from forfeiture can be applied. The Court stated the following at paragraphs 7 to 9 inclusive:

7. The matter is generally covered in the following passage in vol. 51C of Corpus Juris Secundum at p. 330:

A forfeiture is in the nature of a penalty for doing or failing to do a particular thing, and results from failure to keep an obligation. A provision giving either party the right to terminate the lease under certain conditions is not a provision for a forfeiture.

8. In Woodfall's Law of Landlord and Tenant, op. Cit., at para. 17.289, the following is said in the course of dealing with the subject of exercising an option to terminate a lease:

Unless the lease contains conditions restricting the circumstances in which the option may be exercised, the motive of the party exercising it is irrelevant. The fact that exercise of the option causes hardship is no reason for restraining its exercise.

9. In this case, the hardship is caused not to the tenant, who is content with the termination of the lease, but to the subtenant who is being put out of its space in an untimely way as a result of the act of the tenant. Had this act amounted to a breach of, or default under, the lease, the court would be able to intervene and grant relief to the subtenant. Because the act of the tenant was not a breach of, or a default under, the lease, there is no basis for the court to be able to grant relief to the subtenant under s. 21, which requires a re-entry or a forfeiture.

[54] In the case at bar the Landlord initially took the position that the Tenants' act amounted to a default under the lease. For what it is worth I note further on January 19, 2007 after the Landlord had received advice that the Tenants would not be making arrangements to vacate the premises on or before March 30, 2007, the Landlord provided the Tenants with a notice of default dated February 10, 2007, based on the Tenants' alleged refusal to allow the Landlord to show the premises to prospective tenants. In that the Tenants are in default under the lease, according to the Landlord in both of these instances, relief from forfeiture is available. Relief from forfeiture is an equitable remedy that I may apply in my discretion when it is just and equitable to do so. In all of the circumstances the Tenants' act or acts were not a serious breach

or breaches. The conduct was due solely to the Tenants' desire to incorporate the original Partnership. The Landlord has not suffered any economic loss other than the ability to charge a significantly higher rent from new tenants or the present Tenants if the Lease is terminated. In my view the Tenants acted in good faith throughout. The Tenants' conduct is such that they present with clean hands. The Landlord's loss of a potential windfall to be received from higher rents is no reason to deny relief from forfeiture.

[55] Relief from forfeiture is granted again on the basis the Tenants must cure the default within ten (10) business days by re-assigning the Lease from the Corporation to the Partnership. The re-assignment can be accomplished in that both entities, the Corporation and the Partnership have the same shareholders. If the default is not cured as directed, the Landlord can proceed with its remedies under the Lease where the Tenants have not cured the default.

[56] Counsel may make an appointment to speak to me with respect to costs if necessary.

Heard on the 29th day of October, 2007 and January 29, 2008.

Dated at the City of Calgary, Alberta this 23rd day of June, 2008.

A.G. Park
J.C.Q.B.A.

Appearances:

Mr. Sean Smyth
for the Applicant

Mr. James Glass
for the Respondent