

Court of Queen's Bench of Alberta

Citation: Orbus Pharma Inc. v. Kung Man Lee Properties Inc., 2008 ABQB 754

Date: 20081209
Docket: 9801 01036
Registry: Calgary

Between:

Orbus Pharma Inc.

Plaintiff

- and -

Kung Man Lee Properties Inc.

Defendant

**Reasons for Judgment
of the
Honourable Mr. Justice C.S. Brooker**

Introduction

[1] This case is about the proper interpretation of a commercial lease.

Facts

[2] On October 26, 1995, Bovar Environmental Partnership (the "Plaintiff") entered into a commercial office lease agreement (the "Lease") with Kung Man Lee Properties Inc. (the "Defendant"). The leased premises were Suite 390 and Suite 1690, 555 - 4th Avenue S.W., Calgary, Alberta (the "Leased Premises").

[3] The Lease was for a five year term from November 1, 1995 to October 31, 2000. The rent for Suite 1690 began at \$3.00 per square foot and escalated annually to \$8.00 per square foot in the final year of the Lease. The rent for Suite 390 started at \$1.00 per square foot and escalated

annually to \$6.00 per square foot in the final year of the Lease. Bovar used the leased premises to carry out its environmental consulting business. Bovar had a number of other divisions, and had in the past been regularly involved in the buying and selling of businesses. As a result, Bovar was regularly involved with commercial leases.

[4] The Lease was the Defendant's "standard form lease" and contained the following provisions that are of principle relevance to this decision. An amendment was made to clause 17.01 during the negotiation of the contract and words were struck. I have reproduced the contract as it existed at the time of signing.

17.01 The Tenant will not assign this Lease in whole or in part, nor sublet any or all part of the Leased Premises, nor mortgage or encumber this Lease or the Leased Premises or any part thereof, nor suffer or permit the occupation of all or any part thereof by others, without the prior written consent of the Landlord in each instance, which consent may ~~notwithstanding any statutory provision or provisions to the contrary,~~ be unreasonably withheld. The consent by the Landlord to any assignment or subletting shall not constitute a waiver of the necessity for such consent to any subsequent assignment or subletting. This prohibition against assignment or subletting shall be construed to include a prohibition against any assignment or subletting by the operation of law. If this Lease is assigned, or if the Leased Premises or any part thereof is sublet or occupied by anyone other than the Tenant, the Landlord may collect rent from the assignee, subtenant or occupant and apply the net amount collected to rent herein reserved, but no such assignment, subletting, occupancy or collection shall be deemed a waiver of this covenant, or the acceptance of the assignee, subtenant, or occupant as tenant, or a release of the Tenant from the further performance by the Tenant of the covenants on the part of the Tenant herein contained. Notwithstanding any assignment or sublease, the Tenant shall remain jointly and severally liable on this Lease and shall not be released from performing any of the terms, covenants and conditions of the Lease. Any consent to assignment of this Lease shall be prepared by the Landlord or its solicitors, and all legal costs with respect thereto shall be borne by the Tenant. Any consent granted by the Landlord shall be subject to the Tenant causing any such assignee, sublessee or occupant to execute an indenture and covenant directly with the Landlord agreeing to be bound by all of the terms contained in this Lease, as if such assignee, sublessee or occupant had originally executed this Lease as Tenant.

17.03 In the event that the Tenant desires to assign, sublet or part with possession of all or any part of the Leased Premises or to transfer this Leases (*sic*) in any other manner, in whole or in part or any estate or interest thereunder, then and so often as such event shall occur the Tenant shall give prior written notice to the Landlord of such desire, specifying

therein the proposed assignee, transferee or sublet tenant and the Landlord shall, within thirty (30) days thereafter, notify the Tenant in writing either, that: (i) it consents or (ii) does not consent as aforesaid to the assignment, subletting or parting with or sharing possession as the case may be, or (iii) it elects to cancel this Lease in preference to the giving of such consent. In the event the Landlord elects to cancel this Lease as aforesaid, the Tenant shall notify the Landlord in writing within fifteen (15) days thereafter of the Tenant's intention either to refrain from such assigning, subletting or parting with or sharing possession or to accept the cancellation of this Lease. Should the Tenant fail to deliver such notice within such period of fifteen (15) days, this Lease will thereby be terminated upon the expiration of the said fifteen (15) day period. If the Landlord shall not exercise its option to cancel this lease, then 17.01 and 17.05 continue to apply.

[5] Prior to Bovar entering into the lease, it was reviewed by its legal department. It was during this review that Bovar and the Defendant agreed to amend Article 17.01 to delete the words "withstanding any statutory provision or provisions to the contrary."

[6] In 1997, Bovar's management decided to sell most of Bovar's assets, other than its waste treatment division. The sale included the environmental consulting division managed by Bovar Environmental Partnership. Conor Pacific Environmental Consulting Inc. ("Conor") expressed an interest in purchasing Bovar's assets. Conor and Bovar negotiated for a number of months, and announced the general terms of an Asset Purchase Agreement ("APA") on August 6, 1997. The "APA" was dated effective July 1, 1997, but it did not close until late October or early November 1997. Pursuant to the terms of the APA, Conor was to pay a purchase price of \$2,318,558.50 plus "Working Capital."

[7] The APA anticipated the assignment of the Lease by Bovar to Conor. It contained conditions that the consent of the Defendant to the assignment of the Lease would be obtained prior to closing.

[8] On October 2, 1997, Bovar wrote to the Landlord's agent to advise of the upcoming sale of its assets to Conor. This sale was to close on October 10, 1997. Bovar made a formal written request that the Defendant consent to an assignment of the Lease to Conor. On October 16, 1997, the Defendant's agent delivered a letter to Bovar advising that in accordance with Section 17.03(iii) of the Lease, the Landlord elected to cancel the lease in preference to the giving of such consent. No reasons other than Clause 17.03 were given for the refusal to consent to the assignment.

[9] On October 20, 1997, Bovar wrote to the Defendant's agent and advised that Bovar did not accept the cancellation of the Lease, because its position was that Clause 17.03 could only be triggered by a "reasonable withholding" of consent. On November 3, 1997, the Defendant's agent sent Bovar a letter stating that fifteen days had passed since the date of their notification, and the lease was cancelled effective November 1, 1997.

[10] Notwithstanding that it did not have consent to the assignment of the lease to Conor, Bovar proceeded to close the APA. In order to do so, Bovar negotiated a \$167,053.50 reduction of the purchase price. At the time of the cancellation of the lease, the rent under the Lease was considerably below market value. The reduction in price of the APA represented the difference between the lease rates under the Lease and what Conor would have to pay for the space. Following the cancellation of the Lease, the Defendant entered into a separate lease with Conor, charging \$15.00 per square foot, \$9.00 more per square foot than the amount payable under the Lease.

[11] The Plaintiff submits that the lost value of the Lease can be valued at between approximately \$242,000 and \$346,000.

[12] The Plaintiff argues that, by purporting to terminate the lease pursuant to Clause 17.03, the Defendant in fact breached the terms of the Lease. As a result of this breach, the Plaintiff seeks \$167,053.50 in damages, representing the amount that the price of the APA was lowered following the failure of the Defendant to approve the transfer of the Lease.

Issue

[13] The issue in this case is: does this Lease permit the Defendant to terminate the lease rather than consenting to its assignment when there is no reasonable basis for withholding consent?

Position of the Parties

Plaintiff

[14] The Plaintiff submits that Clause 17.01 qualifies Clause 17.03, and that the Defendant was only entitled to terminate the lease if it had a reasonable basis to withhold consent. Since no reasonable basis to withhold consent existed, the termination of the lease constituted an unreasonable withholding of consent in breach of Clause 17.01. The Plaintiff argues that this is the most reasonable, objective interpretation consistent with the principles of contractual interpretation. The Plaintiff argues that were the lease not interpreted in this manner, Clause 17.01 would be rendered meaningless, and there would be a conflict between Clause 17.01 and 17.03.

[15] Pursuant to the Plaintiff's interpretation of the lease, the choices available to the Landlord were as follows:

- a) In the event a reasonable basis to withhold consent existed:
 - i) Withhold consent.
 - ii) Consent to the Assignment.
 - iii) Terminate the Lease
- b) In the event that no reasonable basis to withhold consent existed:
 - i) Consent to the Assignment.

[16] Since the Defendant concedes that there was no reasonable basis upon which to withhold consent in this instance and that the Defendant's actions were undertaken solely pursuant to the terms of Clause 17.03, according to the Plaintiff's interpretation of the lease, the only option available to the Defendant in this instance was to consent to the assignment.

[17] The Plaintiff argues that its interpretation avoids a commercially unreasonable result, is consistent with the principle that any attempts to restrict the alienation of property should be strictly construed against the party that drafts the document, and reflects the commercial background and setting. The Plaintiff further submits that its interpretation leads to the most commercially reasonable result, and had the Defendant intended to modify Clause 17.01 by Clause 17.03, it would have used clearer language. The Plaintiff provides examples of such clear language from case law and another clause in the lease itself.

[18] In support of its position, the Plaintiff urges me to look at the words crossed out by the parties in their amendment to Clause 17.01. While recognizing the binding authority that requires that such words typically be disregarded, the Plaintiff submits that they may be considered in this case for two reasons. First, the Plaintiff notes that the Defendant, in its Reply to Notice to Admit dated August 28, 1998, stated:

With respect to paragraph 4 of the Plaintiff's Notice to Admit, the Defendant does not admit the facts contained therein as stated by the Plaintiff. Rather, the Defendant admits that the form of Lease Agreement was amended by the parties prior to execution by amending Article 17.01 to delete the following words: "withstanding any statutory provision or provisions to the contrary."

[19] The Plaintiff also points to the Conditional Certificate of Readiness filed with the Court by the Defendant in which it states that the Lease was "altered by the crossing out of certain words and terms contained therein." The Plaintiff further notes that all of the information obtained about the amendment to Clause 17.01 was obtained through examinations for discovery and read in pursuant to Rule 214. Rule 214 permits any party to use in evidence the examination for discovery of an opposite party. The Plaintiff submits that these constitute formal admissions, and that it is no longer available to the Defendant to take the position that the Court should not refer to the words crossed out in Clause 17.01.

[20] Second, the Plaintiff argues that an ambiguity exists in Clauses 17.01 and 17.03 of the Lease. The Plaintiff argues that the existence of Clause 17.03 in the face of the amended Clause 17.01 creates "awkward clauses" that do not work well together and create ambiguities. Therefore, the Plaintiff submits, the crossed out words may be referred to in resolving the ambiguity.

Defendant

[21] In contrast, the Defendant submits that it had the contractual right under the terms of the Lease to cancel the Lease in preference of giving consent to the requested assignment, and that the Defendant properly exercised that right. The Defendant submits, as it exercised its option to

terminate the lease, the requirement that the withholding of consent be reasonable was not relevant.

[22] Pursuant to the Defendant's interpretation of the lease, the Defendant had the following options available to it:

- a) In the event that there was a reasonable basis to withhold consent:
 - i) Withhold Consent.
 - ii) Consent to the Assignment.
 - iii) Terminate the Lease.
- b) In the event that there was no reasonable basis to withhold consent:
 - i) Consent to the Assignment.
 - ii) Terminate the Lease.

[23] The Defendant submits that this interpretation gives meaning to all of the terms of the contract, while striving to harmonize apparently conflicting terms. It submits that Clause 17.01 ensures that the Plaintiff cannot withhold consent unless there is a reasonable basis upon which to do so. However, it submits that Clause 17.03 allows the Defendant to terminate the lease in preference to giving such consent.

Principles of Contractual Interpretation

[24] Since my decision turns on the proper interpretation of the Lease, it is useful to review some of the principles of contract interpretation which have informed my analysis and decision.

[25] The numerous principles of contractual interpretation have a common aim – to assist the court in finding an interpretation that reflects and promotes the intention of the parties at the time they entered into the contract: *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888.

[26] The “cardinal interpretive rule” of contracts is that “the court should give effect to the intentions of parties as expressed in their written document.” *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415 at para. 79. The intent of the parties is to be determined by reference to the words they used in drafting the contract: *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 at para. 54. Therefore, the contract itself and the words it contains are what are to be considered. As Iacobucci, J. went on to state in *Eli Lilly* at para. 55, “Indeed, it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face.” The interpretation of the contract is to be conducted on an objective basis, that is, through a determination of what a reasonable person would infer from the words used: *ATCO Electric Ltd. v. Alberta (Energy and Utilities Board)*, 2004 ABCA 215 at para. 77. The court is not searching for the subjective intention of the parties at the time the contract was made, but is making an objective judgment of the parties’ intentions based on the material before it: *ATCO* at para. 77.

[27] In support of this “cardinal rule” a number of other significant principles of contractual interpretation have been developed. A court must, whenever possible, give effect to all of the

terms of a contract, and not reject some terms as having no meaning: *369413 Alberta Ltd. v. Pocklington*, 2000 ABCA 307 at para. 19, *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12 at para. 9. One cannot “simply pick and choose clauses – or parts of clauses – without considering the contract as a whole: *ATCO* at para. 77. In order to give effect to all the terms, it may be necessary to “strive to harmonize apparently conflicting terms in a contract:” *Pocklington* at para. 19 citing *Cotter v. General Petroleum Ltd.*, [1951] S.C.R. 154 at 158. Such efforts to harmonize apparently conflicting terms will often result in an interpretation that qualifies general terms by specific terms. In other words, “where there is apparent conflict between a general term and a specific term, the terms may be reconciled by taking the parties to have intended the scope of the general term to not extend to the subject matter of the specific term:” *BG Checo* at para. 9. The court may also consider the absence of words in an agreement: *Controls & Equipment Ltd. v. Ramco Contractors Ltd. et. Al.* (1999), 209 N.B.R. (2d) 1 (C.A.) and *Geoffrey L. Moore v. Manitoba Motor League (c.o.b.) CAA Manitoba* (2003), 10 R.P.R. (4th) 1 (Man C.A.) at para. 12.

[28] To assist in determining the intention of the parties, the court may consider the surrounding circumstances or the relevant background against which the contract was concluded: *ATCO* at para. 77. Knowledge of the relevant background information, or “what the parties knew” may assist the court in understanding vague or obscure references: *Gainers Inc. v. Pocklington Holdings Inc.* (2000), 255 A.R. 373 at para. 22. Furthermore, words typically do not have only a single meaning. An understanding of the context in which a contract was conducted enables the court to give the written text “the most appropriate meaning which the words can properly bear:” *ATCO* at para. at para. 77.

[29] However, although the court may consider the surrounding circumstances in which a contract was concluded, extrinsic evidence about the parties’ intentions is typically not admissible. This is often referred to as the “parol evidence rule.” As stated by our Court of Appeal stated in *Paddon Hughes Development Co. v. Pancontinental Oil Ltd.*, 1998 ABCA 333 at para. 27:

Where the parties have reduced their agreement to writing, the parol evidence rule excludes from the court’s consideration extrinsic evidence of the parties’ intentions, that is, direct evidence beyond what is contained within the four corners of the written agreement. The rule is that the court may not consider extrinsic evidence that adds to, subtracts from, or varies the meaning of the written document.

[30] Thus, while the court may look at the surrounding circumstances to inform its interpretation of the written document, it may not go so far as to use extrinsic evidence to effectively expand its considerations beyond the contents of the document. As held in *Eli Lilly* at para 34:

The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding

circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.

[31] There is substantial authority establishing that crossed out (or struck) words should not be considered in interpreting the contract. Such words have been interpreted to constitute extrinsic evidence and thus their consideration is typically prohibited pursuant to the parol evidence rule.

[32] The effect of crossed out words was considered by the Supreme Court in *Knight Sugar Co. v. Webster*, [1930] 4 D.L.R. 343. At page 351 of that judgment, Newcombe J., writing for the majority, referred with approval to the following statement of Lord Hatherley in *A. & J. Inglis v. John Buttery & Co.* (1878), 3 App. Cas. 552 (H.L.) at 558:

Nor can I think, and I believe your Lordships will concur with me in this opinion, that it is legitimate to look at those words which appear upon the face of the agreement with a line drawn through them, and which are expressly, by the intention of all the parties to the agreement, deleted, that is to say, done away with, and wholly abolished. It is not legitimate to read them and to use them as bearing upon the meaning of that which has become the real contract between the parties, namely, the final arrangement of the document which we must now proceed to construe.

[33] The Supreme Court reiterated this principle in *Indian Molybdenum Ltd. v. The King*, [1951] 3 D.L.R. 497 (S.C.C.). Estey, J. stated at 503: "words deleted by the drawing of a line through them, and this deletion initialed by the parties, cannot be looked at."

[34] This principle was more recently endorsed by our Court of Appeal. Relying on the above authorities, the Court stated in *Paddon* at para. 34:

Where, as here, there is no ambiguity justifying the admission of extrinsic evidence in aid of interpretation, it is not proper to refer to the deleted words in construing the meaning of the words actually used by the parties to express their agreement. The words deleted from the Thatcher lease are to be ignored and treated as if they never existed.

[35] However, although there is a general prohibition on the consideration of extrinsic evidence, as the above quotation suggests, there is an exception to the parol evidence rule in the case of an ambiguity in the language of the agreement. In *United Brotherhood Sopinka* J. stated for the majority at para. 43:

One of the exceptions to the parol evidence rule has always been that where there is ambiguity in the written contract itself, extrinsic evidence may be admitted to clarify the meaning of the ambiguous term.

[36] However, as Sopinka J. goes on to state at para. 43, “determining when one falls within the scope of this exception is far from easy, as even what can be said to constitute a patent ambiguity is unclear.”

[37] Difficulty in interpreting a contract is not synonymous with an ambiguity: *Northwestern Mechanical Installations Ltd. v. Yukon Construction Co.* (1982), 37 A.R. 132 at para. 27 and *Paddon Hughes* at para. 29. An ambiguity may be said to arise when an agreement, viewed objectively is “reasonably susceptible of more than one meaning:” *Hi-Tech Group Inc. v. Sears Canada Inc.* (2001), 52 O.R. (3d) 97 at para. 18 (C.A.) Any ambiguity must arise from the words in the document itself, and not from the external circumstances: *Guaranty Properties Ltd. v. Edmonton (City)*, 2000 ABCA 215. If an ambiguity is found, extrinsic evidence may be used for the purpose of clarifying it: *United Brotherhood*.

[38] The presence of an ambiguity also enables the court to apply other principles of contractual interpretation, such as the contra preferentum doctrine. This doctrine instructs the court to interpret an ambiguous provision against the drafting party: *Consolidated Bathurst*.

[39] Absurd or commercially unreasonable results should be avoided, and that “where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties:” *Consolidated Bathurst* at 8. However, the Supreme Court later clarifies in *Eli Lilly* that the “sensible commercial result” is, in the absence of an ambiguity, what the parties intended as determined from the text of the agreement. As the Court states at para. 56:

Admittedly, it would be absurd to adopt an interpretation which is clearly inconsistent with the commercial interests of the parties, if the goal is to ascertain their true contractual intent. However, to interpret a plainly worded document in accordance with the true contractual intent of the parties is not difficult, if it is presumed that the parties intended the legal consequences of their words.

[40] To summarize, the overarching goal of contractual interpretation is to determine the intentions of the parties to the agreement. This is determined first through an examination of the text of the document. In doing so, meaning is to be given to all the terms of the contract, if possible, and the court should strive to harmonize potentially conflicting clauses. The absence of words in a contract may also be considered. It is also appropriate to be cognizant of the surrounding circumstances in which the contract was concluded. Extrinsic evidence, including crossed out words, may not be considered unless an ambiguity is found to be present in the contract. An ambiguity is more than difficulty in interpretation. The presence of an ambiguity allows the court to admit extrinsic evidence for the purpose of resolving the ambiguity, and to use the doctrine of contra preferentum in interpreting the ambiguous clause against the drafter of the document.

[41] The parties generally agree with the principles of contractual interpretation outlined above. However, they disagree in the interpretation of the contract that results from the application of these principles to the case at bar.

Analysis

[42] Because whether I am permitted to consider the crossed out words affects the scope of contractual interpretation, I will begin by considering this issue.

[43] First, I do not accept the Plaintiff's argument that the Defendant has formally admitted the crossed out words, and therefore the Court may consider them. An admission by the Defendant that an amendment was made and that crossed out words exist does not equate to an admission that the Court may consider the crossed out words. None of the purported "admissions" of the Defendant contain statements about whether the court should consider the crossed out words. A mere admission that the amendments existed was entirely proper. Whether such amendments are to be considered in evidence is a legal question and is for the Court to determine, based on prior authority and legal argument.

[44] Second, I do not accept the Plaintiff's argument that an ambiguity exists in Clauses 17.01 and 17.03 of the Lease. Both Clause 17.01 and 17.03 are clear, and indeed, the Plaintiff does not put forward arguments that the Clauses, independently, present difficulties in interpretation. Rather, the Plaintiff's contention is that the clauses, when read together, are difficult to reconcile. This may be an example of a difficulty in interpretation but it is not an ambiguity. The Clauses are clear on their face.

[45] I now turn to the proper interpretation of the lease, disregarding the crossed out words in Clause 17.01. While I have reviewed the lease in its entirety, this dispute turns on Clauses 17.01 and 17.03 and their interaction.

[46] I have taken note of the commercial context in which this lease was signed. The lease was concluded between two highly sophisticated, commercial parties. The lease was reviewed by legal counsel for both sides of the dispute.

[47] In determining the intention of the parties, I have strived to find an interpretation that gives meaning to and harmonizes Clauses 17.01 and 17.03. In considering the interpretations put forward by the Plaintiff and the Defendant, I conclude that the interpretation of the Defendant accurately represents the intentions of the parties. In coming to this conclusion, I put great weight on the wording of Clause 17.03 and on giving effect to each of the terms of the contract.

[48] The purpose of Clause 17.01 is apparent on its face: it prohibits the Plaintiff from assigning the Lease without the Defendants prior written consent and requires that the Defendant cannot withhold consent unreasonably. The purpose of Clause 17.03 is to outline the options of the Defendant upon receipt of a request to transfer the lease. For greater clarity I reproduce these options below:

... the Landlord shall, within thirty (30) days thereafter, notify the Tenant in writing either, that:

i) it consents or

- ii) does not consent as aforesaid to the assignment, subletting or parting with or sharing possession as the case may be, or
- iii) it elects to cancel this Lease **in preference to the giving of such consent.** [my emphasis]

[49] I find that the phrase “in preference to the giving of such consent” is determinative. There are two options, i) and ii), that involve the Landlord’s consent. As such, they invoke the requirement in Clause 17.01 that, should the Landlord withhold consent, such withholding must be reasonable. However, the third option, iii), gives the Landlord the right to cancel the lease in preference to the giving of such consent.

[50] As defined in Black’s Law Dictionary, 8th edition, “preference” is: 1) The act of favoring one person or thing over another; the person or thing so favored. 2) Priority of payment given to one or more creditors by a debtor; a creditor’s right to receive such priority. From this definition, and on a plain reading, the third option then appears to give the Landlord an independent alternative that exists outside of the giving or denying of consent. In other words, Clause 17.03 prioritizes the specific right given to the Defendant to terminate the lease over the general right of the tenant not to have consent unreasonably withheld set out in Clause 17.01.

[51] This interpretation is further supported when one considers the final line of Clause 17.03 which states:

If the Landlord shall not exercise its option to cancel this Lease, then Section 17.01 and 17.05 shall continue to apply.

[52] This implies that, if the Landlord does exercise its option to cancel, Section 17.01 does not apply. This is consistent with the Defendant’s interpretation: Section 17.01 does not apply in that instance because the Landlord is choosing an option that exists independently from granting or withholding consent. The other options open to the Landlord involve issues of consent, and therefore, in those situations Section 17.01 would continue to apply.

[53] This conclusion is consistent with the principles of contractual interpretation. It gives effect to both Clauses 17.01 and 17.03. A general right not to have consent unreasonably withheld is extended by Clause 17.01. The right is limited by 17.03, where the Landlord is given an additional right; to terminate the lease. This interpretation is consistent with the approach advocated in *BG Checko* at para. 9, where the Court states: “where there is apparent conflict between a general term and a specific term, the terms may be reconciled by taking the parties to have intended the scope of the general term to not extend to the subject matter of the specific term.” The general right of the Plaintiff to not have consent unreasonably withheld does not extend to the specific right granted to the Defendant to terminate the lease.

[54] This does not, as argued by the Plaintiff, render Clause 17.01 “utterly meaningless.” If the Defendant did not wish to terminate the Lease, consent could not have been withheld and the Plaintiff could not have been compelled to continue to be bound by the terms of the Lease agreement. Clause 17.03 simply gives the Defendant an additional right of termination.

[55] In contrast, the interpretation offered by the Plaintiffs fails to recognize the additional option granted to the Defendants by Clause 17.03. The Plaintiff inserts the concept of consent, (and thus, imports the operation of 17.01) into all three of the options granted to the Defendant by Clause 17.03. However, on a plain reading, the concept of consent is present only in the first and second options. To add it to the option to terminate the Lease is to go beyond the plain text of the document. Furthermore, the Plaintiff's interpretation renders the last sentence of Clause 17.01 meaningless. This is inconsistent with the principle that all words in a contract should be taken to have meaning.

[56] Both the Plaintiff and Defendant offered examples of other cases in which provisions containing an option to terminate had been interpreted. While such cases were useful in providing background, their terms can be distinguished from those of the Lease before me. In *Maverick Professional Services Inc. v. 592423 Ontario Inc.*, [2001] O.J. No. 1304 (Ont. Ct. Justice) (aff'd at [2001] O.J. No. 1877 (C.A.)), submitted by the Defendant, the decision of a Landlord to terminate a lease pursuant to an option to terminate was upheld as valid. However, as the Plaintiff rightly points out, the wording of the option to terminate in that Lease was somewhat different than the wording in the Lease before me. As such, this decision can be distinguished and is of little persuasive value.

[57] The Plaintiff provided me with two American decisions (from the Court of Appeals of Indiana and the Court of Appeal of Florida) and an unreported Ontario District Court case *Priftis v. Trilea Holdings Inc.* (unreported, June 17, 1988, Ont. Dist. Ct.). In each of these cases, the Court interprets an option to terminate as being subject to the right not to unreasonably withhold consent. However, again, these cases turn on differently worded leases governing different situations. Furthermore, these cases were decided in a different legal context (considering both the passage of time and the differences in jurisdiction) and do not constitute persuasive authority.

[58] Although I accept the Defendant's interpretation of the Lease, I will go on to address the remainder of the arguments raised by the Plaintiff.

[59] The Plaintiff argues that the Defendant's proposed interpretation fails to give proper consideration to Clauses 3.01 and 9.01 of the Lease. The Plaintiff submits that these clauses indicate that the parties intended that the Plaintiff would have the benefit of the Lease for the entire term. Those Clauses provide as follows:

- 3.01 In consideration of the rents, covenants and agreements hereinafter reserved and contained to be paid, observed and performed by the Tenant, the Landlord hereby demises and leases to the Tenant the Leased Premises to have and to hold the same for and during the Term set out in Section 3.02. The Tenant hereby accepts the Lease of the same ...
- 9.01 The Landlord covenants with the Tenant that if the Tenant pays the rent hereby reserved and performs its covenants and obligations herein

contained, the Tenant shall and may peaceably possess and enjoy the Leased Premises for the Term hereby granted without any interruption or disturbance from the Landlord or any other person lawfully claiming by, from or under him.

[60] These provisions are examples of general provisions. These provisions may be, and in this case are, modified by specific terms in other provisions. Recognizing such modifications gives effect to each clause in the contract, and is consistent with the approach in *BG Cheko*. By providing an option to transfer the Lease it is evident that the parties intended that, in specified circumstances, the term of the Lease could be altered. This would be the case even under the Plaintiff's proposed interpretation, provided that consent to an assignment was granted.

[61] The Plaintiff puts before me cases containing examples of clauses granting a right to the Landlord to terminate the lease on a request for assignment. The Plaintiff submits that the provisions in these cases were drafted more clearly than in the lease before me. For example, in *Zurich Canadian Holdings Ltd. v. Questar Exploration Inc.* (1998), 222 A.R. 292 (Q.B.), the lease provided:

The Tenant shall not enter into, consent to, or permit any Transfer without the prior written consent of the Landlord in each instance, which consent shall not be unreasonably withheld but shall be subject to the Landlord's rights under s. 8.02 (a right of termination).

[62] The Plaintiff also provided me with the following cases to illustrate what it considers to be clearer and more precise drafting: *Lehndorff Canadian Pension Properties Ltd. v. Davis Management Ltd.* (1989), 37 B.C.L.R. (2d) 306 (C.A.), *Maverick Professional Services Inc. v. 592423 Ontario Inc.* (2001), 42 R.P.R. (3d) 60 (Ont. C.A.), *In Re: Fasion World Inc., 1984 Bankr.* LEXIS 4593 (U.S. Bankruptcy Court, *Tri-Tech Energy Research Ltd. v. Calgary Centre Properties (1983) Ltd.*, [1988] A.J. No. 201 (Q.B.)). The Plaintiff argues that, had the parties intended to create a right of the Defendant to terminate the Lease in a situation where consent could not reasonably be withheld, the provision would have been drafted more precisely in a manner similar to the provisions in the cases above.

[63] It may be true that, as the Plaintiff suggests, it would have been possible for the Clauses 17.01 and 17.03 to have been drafted in a manner that more clearly reflected the parties' intentions. However, I am satisfied upon reading the Lease that the Defendants were entitled, pursuant to its terms, to terminate it pursuant to Clause 17.03. That other parties dealing with other leases drafted an option to terminate differently does not lead to the conclusion that the intentions of these parties were different. In fact, although expressed differently, I have concluded that the aim of the parties here was to provide an option to terminate, as was the intention of the parties in the alternate provisions provided to me. Thus, the authorities provided by the Plaintiff do not alter the interpretation that I have drawn from the words in the Lease before me.

[64] The Plaintiff also points to Article 15 of this Lease, which states:

Whenever subsections (b) or (c) [both of which relate to circumstances when the leased premises become rendered unfit for the Tenant's use] apply, **unless the Landlord elects to terminate this Lease under subsection (c) or under Section 15.02**, the Landlord shall commence diligently to reconstruct, rebuild or repair the building to the extent only of the Landlord's repair obligations under the Lease [Emphasis Added].

[65] I reiterate the comments above. This is a distinct provision, the meaning of which turns on different contractual language. It deals with a distinct situation. Although it can be argued that the Clauses 17.01 and 17.03 could have been written to more clearly express the parties intentions, I am required to interpret the Clauses as they are written. That Article 15 mentions an election to terminate under a distinct provision does not alter my interpretation of Clauses 17.01 and 17.03.

[66] The Plaintiff further urges me to take notice of the *contra preferentum* doctrine. As I have found that no ambiguity exists here, this doctrine is not applicable. The Plaintiff also argues that written alterations to standard form contracts are given preference over a standard form when they are in conflict. As I have not found that Clauses 17.01 and 17.03 conflict, this argument is also inapplicable.

[67] The Plaintiff also cites authority for the proposition that provisions restricting alienation of property should be interpreted strictly and against the Landlord (*Grove v. Portal* (1902), 1 Ch. 727 (Eng. Ch. Div.), *Dominion Stores Ltd. v. Bramalea Ltd.* (1985) 38 R.P.R. 12 (Ont. D.C.), *Loeb v. Cooper* (1991) 3 B.L.R. (2d) 8 (Ont. Gen. Div.), *Shapira v. Handelman*, [1947] 2 D.L.R. 492 (Ont. C.A.), *Cook v. Shoemith*, [1951] 1 K.B. 752 (Eng. C.A.), *Lehndorff v. Davis Management* (1989) 37 B.C.L.R. (2d) 306 (C.A.)). This is not a commonly cited principle in Canadian law, and the Plaintiff did not provide any Canadian appellate authority in which this principle was decisive (or, indeed, significant) in the interpretation of a lease. However, even if I were to accept that this were a valid principle of contractual interpretation, it cannot supplant my findings based on my application of the "cardinal principle" of contractual interpretation: the intention of the parties as established from the words of the lease itself.

[68] Finally, the Plaintiff argues that to adopt the Defendant's interpretation would lead to an absurd commercial result. I do not agree. In fact, I find the contrary to be true. Here, the Lease, because it was considerably below market rate, was of significant value to the Plaintiff and a liability to the Defendant. The circumstance here pertaining support my interpretation of the contract. In essence, the Defendant's option to terminate the contract instead of consenting to its transfer permitted it (rather than the Plaintiff) to get the benefit of the then current market lease rates. There is nothing commercially absurd about that. It was simply astute bargaining on the part of the Defendant — if market rates were less than lease rates at the time of a requested assignment, the Defendant could consent to the transfer and preserve the lease rate. If market rates were higher, the request for an assignment of the lease gave the Defendant the opportunity to terminate the lease and enter into another one at the higher current market rate, to its commercial advantage.

[69] However, as I have noted above, even if, as the Plaintiff suggests, adopting the Defendant's interpretation would lead to an absurd commercial result (which I find does not), it is assumed parties intend the commercial results of their contracts (*Eli Lilly*). The interpretation found within the text of the contract concluded by two sophisticated commercial parties cannot be overridden by my opinion of a sensible commercial result.

Damages

[70] As I have found that the Defendant was entitled to take the actions they did pursuant to the terms of the Lease, no damages are awarded to the Plaintiffs. The Plaintiff puts forward an argument that the obligation to not unreasonably withhold consent survived the termination of the lease. As I have found that consent was not unreasonably withheld, given that the third option of Clause 17.03 did not deal with the granting or withholding of consent, this argument has no merit.

Conclusion

[71] The Defendants actions were in accordance with the terms of the Lease. Therefore, there was no breach, and the Plaintiffs are not entitled to damages. Accordingly, the Plaintiff's action is dismissed.

Dated at the City of Calgary, Alberta this 9th day of December, 2008.

C.S. Brooker
J.C.Q.B.A.

Appearances:

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Dean A. Hutchison, McCarthy Tetrault LLP
for the Defendant