COURT OF APPEAL FOR ONTARIO

CITATION: 100 Bloor Street West Corporation v. Barry's Bootcamp Canada Inc., 2025 ONCA 447
DATE: 20250620
DOCKET: COA-24-CV-0456

Paciocco, Monahan and Wilson JJ.A.

BETWEEN

100 Bloor Street West Corporation

Applicant/Responding Party

(Appellant)

and

Barry’s Bootcamp Canada Inc. operating as Barry’s Bootcamp and BBC Holdings, LLC

Respondents/Moving Parties

(Respondents)

Cynthia Kuehl and Gregory Cherniak, for the appellant

Mark Dunn and Julia Martschenko, for the respondents

Heard: January 14, 2025

On appeal from the judgment of Justice Markus Koehnen of the Superior Court of Justice, dated March 28, 2024, with reasons at 2024 ONSC 1879.

Paciocco J.A.:

OVERVIEW

[1] The respondent, Barry’s Bootcamp Canada Inc. (“Barry’s”), rents a commercial property at 100 Bloor Street West in Toronto from the appellant,

100 Bloor Street West Corporation ("100 Bloor").[1] This is an exclusive building on Yorkville's "mink mile". Barry's uses the "Leased Premises", located on the ground and second floors, to operate a high-end fitness studio. The lease, which commenced on September 12, 2019, is a 10-year "triple net lease" which requires Barry's to pay a base rent, its "Proportionate Share" of operating expenses, as well as realty taxes "attributable to the Leased Premises" (together, the "Occupancy Costs").

[2] The parties have been embroiled for some time in litigation relating to the calculation of Barry's rental obligations under the lease, which I will describe in some detail below. The same judge oversaw most of the litigation and decided all but one of the contested matters. A dispute relating to the realty taxes "attributable to the Leased Premises" has already been before this court.[2] Both that appeal and the current appeal address the manner 100 Bloor used to calculate Barry's share of the realty taxes, although the two appeals address different components of the calculation. The current appeal challenges a declaration the motion judge made on March 28, 2024, relating to the method that 100 Bloor proposed to use to calculate the proportion of realty taxes attributable to the building's two-storey underground parking garage.

---

[1] The second respondent, BBC Holdings, LLC, is an indemnifier under the lease.
[2] *100 Bloor Street West Corporation v. Barry's BootCamp Canada Inc.*, 2023 ONCA 247.

[3] In the order currently under appeal, the motion judge also awarded substantial indemnity costs against 100 Bloor in the amount of $709,017.39, representing the costs arising from an injunction, an application, and the motion now under appeal. In assigning these costs he found 100 Bloor's litigation conduct to be "reprehensible". 100 Bloor also seeks leave to appeal that order.

[4] For the reasons below, I would dismiss 100 Bloor's appeal of the motion decision, but I would grant leave to appeal the costs order and allow the costs appeal.

THE MATERIAL FACTS

[5] The Leased Premises, which are accessed from an alley at the back of the building, are a "standard unit" that carries a lower base rent than the "superior unit" premises, which have ground floor frontage on Bloor Street. The base rent for the Leased Premises is set based on the square footage and a standard unit rate. Under the terms of the lease, if the taxing authority assesses and bills the realty taxes for the Leased Premises separately, Barry's would have to pay that billed amount for the tax portion of its rent. If the taxing authority does not do so, article 6.3 of the lease provides that:

> [T]he Landlord shall determine, in its sole and unfettered discretion, the portion of Realty Taxes attributable to the Leased Premises using such method of determination which the Landlord shall choose.

[6] The taxing authority, the City of Toronto, does not issue a separate tax bill for the Leased Premises. Based on an assessment of the current value of each of the rental premises and the two-storey underground parking garage, the Municipality Property Assessment Corporation (MPAC) identifies an aggregate "Current Value" for the entire building. The City of Toronto then assesses and bills property taxes to 100 Bloor on that global basis, using the effective tax rate. The issuance of a global tax bill requires 100 Bloor to determine the realty taxes that Barry's will pay, pursuant to article 6.3 of the lease.

[7] The parties fell into disagreement over the way 100 Bloor proposed to calculate Barry's share of the realty taxes. There were two material points of disagreement.

[8] First, Barry's disagreed with 100 Bloor's proposal to attribute realty taxes to the Leased Premises based on the percentage of the square footage of the retail space that Barry's occupied (a "Proportionate Share" calculation), or 11.878% of the total realty taxes charged to the building. Barry's considered the calculation of taxes on a square footage percentage basis to be unreasonable and therefore impermissible under article 6.3 of the lease. Its position was that the Leased Premises were not as valuable as other leased space within the building because the Leased Premises did not have frontage on Bloor Street and were accessible only through a back alley behind the building. The working papers MPAC had prepared when assessing the building ascribed to Barry's Leased Premises

between 4.06% and 5.06% of the total current value of the retail space (a “Current Value” calculation), so, in Barry’s view, its tax share for the Leased Premises had to fall within that range to be reasonable.

[9] Second, Barry’s objected to the fact that 100 Bloor’s calculation assigned realty taxes to Barry’s relating to the building’s two-storey underground parking garage, using the same Proportionate Share calculation that 100 Bloor proposed for the Leased Premises. This, of course, amounted to 11.878% of the realty taxes payable by 100 Bloor for the underground parking garage, which the parties agreed represented 5.3% of the building’s value. Barry’s took the position that it should not have to pay realty taxes relating to the parking garage because the parking garage was not included in the definition of “Leased Premises” for which taxes were payable by Barry’s under article 6.3 of the lease, and the claim that it should pay a share of the realty taxes for the parking garage was inconsistent with other terms of the lease.

[10] Moreover, for several years there was uncertainty about the ultimate amount of the global realty tax bill because 100 Bloor appealed its 2017 MPAC assessment, which had substantially increased the value of the property. In part because the outcome of the MPAC appeal could change the global realty tax bill for the building, the parties arranged for Barry’s to pay the monthly tax payment based on projections provided by 100 Bloor, along with the base rent and its projected share of monthly operating expenses. The understanding was that

Barry's would have to make good any shortfall once the rental and operating expenses were settled.

[11] Barry's made payments on this basis until the pandemic lockdown occurred in March 2020. As a result of the lockdown, the parties agreed to rental adjustments. Barry's paid, and 100 Bloor accepted, the base rent, as well as Barry's own calculation of operating expenses and realty taxes, which fell below the estimates 100 Bloor had provided. Once again, the parties understood that Barry's would be responsible for the shortfall once the actual rent owing was established. 100 Bloor's general counsel assured Barry's lawyer that 100 Bloor would not take any action against Barry's as long as it made the payments it had promised to make. In the meantime, the parties continued to negotiate about the realty taxes payable under the lease.

[12] On April 26, 2022, 100 Bloor delivered a "Notice of Default in Payment of Rent Under Lease" to Barry's, stating that Barry's owed it $984,407.95. The Notice imposed a one-week deadline on Barry's to pay these "arrears", calling for payment by May 3, 2022, at 5:00 p.m. On April 29, 2022, before that period expired, 100 Bloor entered into a Letter of Intent with a high-end clothier, Harry Rosen, to lease the premises to them, provided 100 Bloor was able to evict Barry's. Barry's did not pay the demanded sum. On May 5, 2022, 100 Bloor attempted unsuccessfully to re-enter the Leased Premises. The effort failed because Barry's had hired around-the-clock security guards to secure the premises.

[13] Barry's issued a Notice of Action on May 9, 2022. On May 10, 2022, 100 Bloor brought an application for a writ of possession and an order terminating the lease. In support, 100 Bloor alleged that Barry's was in arrears of both its share of realty taxes and operating expenses.

[14] On May 16, 2022, a judge other than the application judge who subsequently handled the litigation granted an interlocutory injunction to Barry's preventing 100 Bloor from re-entering the premises until the hearing of 100 Bloor's application.[3] She reserved costs to the judge who would hear that application.[4]

[15] Barry's then brought a cross-application seeking a declaration that 100 Bloor was not entitled to terminate the lease and that its purported termination was invalid. The judge whose decision is the subject of the current appeal, sitting as the application judge, resolved the competing applications on September 6, 2022.

[16] In his application decision of September 6, 2022, he stated, "[t]he principal issue between the parties involved the manner in which realty taxes would be allocated to the leased premises". The application judge found that under the terms of the Lease Agreement, 100 Bloor was required to act reasonably in exercising its "sole and unfettered" discretion to quantify Barry's share of the realty taxes. He went on to hold that 100 Bloor's decision to calculate Barry's share based on its

[3] *Barry's Bootcamp Canada Inc. v. 100 Bloor Street West Corporation*, 2022 ONSC 2962.
[4] *Barry's Bootcamp Canada Inc. v. 100 Bloor Street West Corporation*, 2022 ONSC 4331.

square footage of the building's retail space, in other words, to use a Proportionate Share calculation, was indeed reasonable. He said: "There is no basis in my view for suggesting that the Landlord acted dishonestly or in bad faith when allocating taxes as it did."

[17] However, the application judge ruled in Barry's favour with respect to 100 Bloor's attempt to require Barry's to pay 11.878% of the realty taxes assessed to 100 Bloor for the parking garage. He concluded that the terms of the Lease Agreement do not require Barry's to pay realty taxes relating to the parking garage.

[18] The application judge also rejected 100 Bloor's efforts to terminate the lease. He concluded that Barry's was not in arrears because 100 Bloor had agreed to defer the tax issue, and Barry's had paid the amounts agreed. He said: "The Landlord did not abide by that agreement but simply demanded payment of taxes without forewarning and without providing adequate time to pay". He invoked the doctrine of promissory estoppel, commenting that 100 Bloor had acted unreasonably in not allowing a reasonable time to revert to the exact amounts in light of the tax re-assessment, and by giving Barry's an unreasonably short period to pay its "arrears". He commented:

> I am also troubled by the Letter of Intent with Harry Rosen. In the absence of any further explanation from the Landlord, I infer from the record before me that the notice of termination was not motivated by any breach of the lease on Barry's part but was motivated by a presumably better offer for the premises from Harry Rosen.

[19] He also held that Barry's was not in arrears in paying its share of the Occupancy Costs because 100 Bloor had failed to comply with its own obligations under the lease by failing to provide an estimate of the Occupancy Costs for the upcoming year and a reconciliation of estimated to actual Occupancy Costs at year end. He gave Barry's 60 days to pay its outstanding Occupancy Costs, once 100 Bloor delivered the required reconciliations and estimates.

[20] In the alternative, he granted relief from forfeiture. He therefore dismissed 100 Bloor's application and granted Barry's.

[21] None of the application rulings I have described were disturbed on appeal.[5] Nonetheless, issues relating to Barry's rental obligations remained unsettled after the application decision. First, since the realty tax bills that 100 Bloor received from the City of Toronto amalgamate the taxes for the retail space and the parking garage, the application ruling meant that the taxes from the parking garage would have to be deducted to calculate Barry's share of the realty taxes. The application judge left it to the parties to do so. Second, Barry's share of the operating expenses remained outstanding and had to be settled. The parties fell into disagreement on both issues. Barry's took the position that it had not been provided with intelligible

[5] 100 Bloor did not appeal any of the rulings against it. Barry's brought an unsuccessful appeal to this court against the application judge's finding that it was reasonable and consistent with the Lease Agreement for 100 Bloor to calculate Barry's share of the realty taxes based on the proportion of the square footage of the retail space that it occupied: *100 Bloor Street West Corporation v. Barry's BootCamp Canada Inc.,* 2023 ONCA 247.

estimates, despite the application judge's ruling which anticipated that 100 Bloor would remedy this problem. On November 1, 2022, Barry's brought a motion seeking, among other relief: (1) a declaration that 100 Bloor had failed to provide a reconciliation of the Occupancy Costs, and (2) a declaration that 100 Bloor "must allocate [Realty] Taxes … to the Parking Lot … using the same method used to allocate the other Taxes to Barry's".

[22] This latter issue emerged because, in Barry's view, 100 Bloor was attempting unfairly to minimize the amount of taxes it would deduct. When 100 Bloor thought that it could require Barry's to pay a proportionate share of the realty taxes attributable to the parking garage, it claimed that Barry's owed 11.878% of the parking garage realty taxes, based on Barry's proportionate share of the retail space. But now that 100 Bloor had to deduct the parking garage realty taxes to calculate Barry's share, and although the parking garage occupied 33.2% of the building space, it proposed deducting only 5.03% of the global realty tax bill. This lower figure reflected the Current Value assessment that MPAC assigned to the parking garage. In Barry's view, 100 Bloor was unfairly "mixing-and-matching" calculation methods, using the aggressive "Proportionate Share" method when quantifying what Barry's had to pay, but selecting the more modest "Current Value" method when quantifying what 100 Bloor would have to absorb.

[23] On November 14, 2022, 100 Bloor brought its own motion seeking, among other relief: (i) a declaration that Barry's had failed to pay realty taxes it owed as

well as monthly Occupancy Costs, in breach of the lease; (ii) a declaration that the failure to pay realty taxes was a breach of the lease; (iii) an order that 100 Bloor was entitled to immediate possession; and (iv) an order that Barry's pay the "outstanding" sum of $906,355.92 to 100 Bloor.

[24] On November 16, 2022, a case conference was held to schedule the motions. Since it was not in dispute that Barry's was required to pay deferred expenses, the application judge issued an immediate endorsement requiring Barry's to pay $500,000 to 100 Bloor within 72 hours, just over half of the "outstanding" sum 100 Bloor was claiming. The motion judge commented that the parties should have engaged in good faith discussions. He also gave notice that he would not be able to reach a conclusion if the motion was to be decided based on the record before him, because counsel for 100 Bloor had been unable to explain the breakdown of his client's expense claims or how its tax calculation incorporated the directions contained in the application reasons. The application judge set a further case conference for December 16, 2022, and directed: "At a minimum, each side should be able to clearly explain what it wants or what it has done."

[25] On December 16, 2022, after the scheduled case conference, the application judge issued another endorsement. In it he commented skeptically on 100 Bloor's position relating to the realty tax calculation:

> 11. Although the landlord is entitled to determine what method of calculation it wishes to use to calculate taxes, in my preliminary view, based on the materials before me at the case conference, that method must be consistent within the scope of Barry's lease. The landlord cannot choose one method for a part of the property when it is convenient to the landlord but then choose another method for another part of the property when applying the first method would be inconvenient to the landlord. In other words, the landlord can calculate the taxes Barry's is required to pay based on either the fair market value of individual premises or based on the proportionate share of Barry's premises as compared to the entire commercial premises (or any other reasonable method). The landlord cannot, however, mix-and-match. In my view, doing that would be an unreasonable exercise of the landlord's discretion.
>
> 12. As a result, taxes for the current incoming lease year as well as taxes for any past lease years must be calculated on a single consistent method of the landlord's choosing.
>
> 13. The landlord asks that any amounts arising out of the dispute about the payment of past taxes be paid into court pending final disposition of the issue on the motion being scheduled. I decline to make that order. The landlord did not advise the court during the hearing leading to the September reasons that it proposed to take inconsistent approaches under Barry's lease to the calculation of taxes on different parts of the property. Had it done so, I would have ruled on the issue in a final way in my reasons of September 6, 2022. The fact that I did not do so is the landlord's doing for which Barry's should not be inconvenienced.

[26] He then urged the parties to take a pragmatic view of the motions, which would be "costly and time-consuming". Before encouraging the parties to use mediation or arbitration, the application judge continued:

> 17. Unless the landlord has a crisp, clear explanation of why it should be permitted to use inconsistent methods to attribute taxes to various parts of the building for purposes of calculating Barry's tax liability, it is likely to fail on the motion. The landlord was unable to do so at today's case conference even though it was told in advance that it would be required to do so and even though it knew of the issue before the case conference.... What matters is the way Barry's lease says taxes should be calculated and whether the landlord should be entitled to apply different methodologies to different parts of the building.

[27] As I have explained, this appeal concerns the decision on Barry's motion, which was delivered more than a year later, on March 28, 2024, a delay the application judge had predicted. Both the motion decision itself, and the associated costs decisions, are under appeal. I will address the appeal of the motion and costs decisions in turn, introducing additional facts where they are material.

THE APPEAL OF THE MOTION DECISION

[28] On March 28, 2024, the motion judge granted a declaration that "the Landlord must use the same method for the calculation of the realty taxes attributable to the parking garage at 100 Bloor Street West as it does for the calculation of the realty taxes attributable to the Leased Premises". He gave two independent reasons for his decision.

[29] First, the motion judge interpreted article 6.3 of the lease as requiring a single method to attribute realty taxes because it states that realty taxes are to be

determined "by using such method of determination which the Landlord shall choose" (emphasis added). He concluded:

> Article 6.3 requires the Landlord to use a single method to calculate taxes attributable to the Tenant and use that same method in all components of the calculation. Calculation of the Tenant's realty tax bill involves a single calculation exercise. That calculation has two parts: calculating taxes attributable to the parking garage and then calculating taxes attributable to the Tenant's space. A single calculation should use a single method.

[30] Second, he explained in his endorsement that the attempt by 100 Bloor to mix-and-match calculations was "unreasonable", contrary to s. 6 of Schedule H of the Lease Agreement. In this provision, 100 Bloor agreed that its determinations under the lease "shall be made and given on a reasonable basis." The motion judge concluded that the effect of mixing-and-matching calculation methods is to impose the very Current Value method that 100 Bloor "strenuously resisted … during the application" in order "to come up with the maximum tax rate attributable to the Tenant." He noted that the mixing-and-matching of methods "in effect, has the tenant paying for taxes that would be attributable to the parking garage had the Landlord used a single, consistent method of calculation." It would result in "a disproportionate burden on the Tenant" and attribute $160,000 of the tax bill to the parking garage, and $330,000 of the tax bill to the Leased Premises, even though the parking garage holds more of the building's value than the Leased Premises.

He observed: “In other words, the tenant would be faced with a tax bill twice as large as the parking garage even though its premises are worth less.”

[31] 100 Bloor raises several grounds of appeal against the motion decision which I identify and analyze below. This court determined in *100 Bloor Street West Corporation v. Barry’s BootCamp*, 2023 ONCA 247, 48 R.P.R. (6th) 173, at para. 8, that the Lease Agreement here is not a standard form contract and that absent an extricable error, the standard of review is palpable and overriding error. 100 Bloor argues that the motion judge made extricable errors of law. I disagree. I would not give effect to any of the grounds of appeal it advances.

A. ANALYSIS

(1) The judge did not reverse the burden or apply the wrong lease standard

[32] As I have outlined in the narrative of material facts at para. 25 above, in his December 16, 2022 endorsement, the application judge, acting at the time as a case conference judge, expressed his “preliminary view, based on the materials before [him] at the case conference” that it would be an unreasonable exercise of 100 Bloor’s discretion to “mix-and-match” calculation methods when calculating Barry’s realty taxes. He cautioned 100 Bloor that “[u]nless the landlord has a crisp, clear explanation of why it should be permitted to use inconsistent methods … it is likely to fail on the motion.” He remarked that 100 Bloor was unable to present a

clear and crisp explanation for its position at the case conference meeting “even though it knew of the issue before the case conference.”

[33] The parties agree before us that since Barry’s brought the motion, it bore the burden of proof during the motion hearing. In his motion endorsement the motion judge did not explicitly identify the onus of proof that applies to the tax calculation issue. However, when explaining why he was awarding substantial indemnity costs, he reproduced para. 17 of his December 16, 2022 case conference endorsement and commented that in spite of what he had said 100 Bloor nevertheless insisted on proceeding with the motion, “but had no crisper or clearer explanation for its position at the motion than it did at the case conference.”

[34] 100 Bloor submits that together the two endorsements reveal that the judge: (1) “prejudiced and effectively predetermined [the] issue”, (2) erroneously “placed a clear onus on the Landlord to overcome his preliminary determination”, and (3) misdirected himself as to the lease requirements, which required a “reasonable” allocation of taxes, not a “crisp, clear explanation”.

[35] I do not accept these submissions.

[36] First, I am not persuaded that the motion judge “prejudiced” or “effectively predetermined” the issue. The context in which his impugned comments were made is important. During the December 16, 2022 case conference, Barry’s sought

guidance on the proper calculation of the realty taxes. The application judge, having already held a case conference and adjudicated the application, was familiar with the issues, and it is clear from his case conference endorsements that the parties had put their positions before him and knew beforehand that they would be expected to do so. It is inevitable in these circumstances that the judge gained a preliminary impression of the likely merits of the parties' positions. He ultimately decided not to give the guidance that Barry's sought but, concerned about the costs and delays in fully adjudicating the issues, and mindful of his role as a case conference judge in an overburdened court, he encouraged the parties to settle. He shared what he explicitly said was his: (1) "preliminary view", (2) "based on the materials before [him]" (emphasis added). It is obvious that he did this to encourage 100 Bloor to reflect on its position with an appreciation of the challenges it faced, while assuring the parties that he had an open mind and would decide the motion based on the materials and arguments made at the motion. 100 Bloor has not persuaded me that it was inappropriate for the judge to make such comments while conducting a case conference.

[37] Notably, after it received the case conference endorsement, 100 Bloor did not ask the judge to recuse himself as the motion judge, and it now disclaims any intention to suggest that he was biased. Instead, it proceeded with the motion without objection, and now seeks to challenge the motion judge's open-

mindedness while denying that it is doing so. I would not accede to 100 Bloor's submission that the motion judge was prejudiced or predetermined the motion.

[38] Second, I see no basis for concluding that the motion judge reversed the onus by calling for a "crisp, clear explanation" from 100 Bloor for mixing-and-matching calculation methods. 100 Bloor's position, which was openly shared during the case conference, was an about-face from the position it took during the application and transparently self-serving. On its face, that suggested unreasonableness. The judge was not reversing the onus by sharing his preliminary impressions to this effect, based on the materials before him, or by alerting 100 Bloor that the explanation it was offering at the case conference for using "inconsistent methods to attribute taxes to various parts of the building" was neither crisp, nor clear. Viewed in context, a fairer characterization of the comments the judge made on December 16, 2022 is that he was simply alerting 100 Bloor to the apparent likelihood that Barry's would meet its onus on the motion unless 100 Bloor could explain its seemingly problematic position in a more persuasive manner than it did at the case conference.

[39] Nothing in the motion decision itself suggests that the motion judge imposed the legal burden on the motion on 100 Bloor. The motion judge did not explicitly state that the legal burden was on Barry's, but he is presumed to know the law, and the assignment of the burden in a motion of this kind is a trite matter that does not require explicit mention. In any event, the definitive language the motion judge

used in expressing his conclusions shows that he was satisfied that Barry's claims were proven: "The Landlord's method of calculating taxes is not appropriate"; "the Landlord's calculation of taxes is not reasonable"; "[t]he lease … does not allow the Landlord to use such 'methods' as it may choose." Nothing he said suggests that he decided the case because 100 Bloor had failed to disprove these claims.

[40] Similarly, I do not accept 100 Bloor's submission that the motion judge's comment in his motion endorsement that it "had no crisper or clearer explanation for its position at the motion than it did at the case conference" shows that he reversed the onus. The motion judge did not make this comment when resolving the realty tax issue. He made it when addressing costs. It is evident, from the context and what he said when discussing costs that he was not describing or even alluding to the applicable standard of proof on the substantive merits of the motion. Instead, he was offering this observation in support of his conclusion that 100 Bloor bore responsibility for what he concluded was an entirely unnecessary motion, a point I will return to below.

[41] Finally, there is no basis for concluding that the motion judge misdirected himself as to the lease requirements when he called for a "crisp, clear explanation" from 100 Bloor for using "inconsistent methods to attribute taxes to various parts of the building". When he made the impugned comments, he was not purporting to interpret the lease. As I have explained, he was foreshadowing the apparent challenges with 100 Bloor's position. And when reviewing the entirety of his motion

endorsement, it is evident that he fully understood that the Lease Agreement required a reasonable exercise of the discretion conferred by article 6.3 to allocate realty taxes.

[42] I would deny this ground of appeal.

(2) The judge did not err in interpreting the lease

[43] 100 Bloor argues that the motion judge committed an extricable error of law in finding that article 6.3 requires a "single method" because "that language is not supported by the Lease".

[44] I disagree. It was open to the motion judge to come to the decision he did, based on the principles of contractual interpretation affirmed in *Sattva Capital Corp. v. Creston Moly Corp*, 2014 SCC 53, [2016] 2 S.C.R. 633, at paras. 47-48.

[45] Article 5.3 is the lease provision that obliges Barry's to pay a share of the realty taxes. It states:

> The Tenant shall pay to the Landlord, at the times and in the manner provided in this Lease, the Tenant's share of Realty Taxes and the Tenant's Proportionate Share of the Operating Expenses determined in accordance with Schedule "B" attached hereto (collectively, the "Occupancy Costs").

[46] For its part, article 6.3 addresses the amount of realty tax payments. It provides in material part:

> The Tenant shall pay to the Landlord as Additional Rent … an amount equal to that portion of Realty Taxes

> separately assessed against the Leased Premises, subject to the provisions hereunder set out…. [I]n the event that Realty Taxes are not separately assessed against the Leased Premises by the Taxing Authority, the Landlord shall determine, in its sole and unfettered discretion, the portion of the Realty Taxes attributable to the Leased Premises using such method of determination which the Landlord shall choose. [Emphasis added.]

[47] In my view, the motion judge was entitled to conclude that 100 Bloor is contractually obliged by article 6.3 to use a single method of calculation. I recognize that article 6.3 gives 100 Bloor "sole and unfettered discretion" to determine the portion of the realty taxes to attribute to Barry's. However, 100 Bloor must make that discretionary decision in the manner directed by article 6.3, which stipulates that 100 Bloor shall do so "using such method of determination which the Landlord shall choose" (emphasis added). In its ordinary and grammatical meaning, and in the context in which it was used, the term "method" is singular, not plural. 100 Bloor has identified nothing in the surrounding circumstances that would alter this. It did argue before us that there is a practice of reading singular words as embracing the plural, and that the motion judge failed to respect this practice. But the authorities 100 Bloor relies on, the *Legislation Act, 2006*, S.O. 2006, c. 21, ss. 46, 47 and 67, and the decision in *McLeod v. General Motors of Canada Limited et al*., 2014 ONSC 134, 20 M.P.L.R. (5th) 13, at para. 206, are inapposite. They deal with statutory not contractual interpretation.

[48] 100 Bloor relies primarily on two arguments in opposition to the motion judge's interpretation, each based on the text of article 6.3 itself. First, it argues that when properly interpreted article 6.3 permits it to choose a formula to *attribute* realty taxes among the building's retail units, which may differ from the method it uses to *calculate* the realty taxes owing respectively from the retail space and the parking garage.

[49] Second, and relatedly, 100 Bloor submits that the Leased Premises are defined in the Lease Agreement as part of the "Retail Component" only, in other words, the retail floor space located on the first two floors of the building. It argues that since the parking garage is not part of the retail floor space, the term "method" in article 6.3 does not apply to the calculation of the amount of realty taxes attributable to the parking garage. 100 Bloor argues that by interpreting "method" as applying to the quantification of parking garage taxes, the effect of the motion judge's decision is to redefine the term "Leased Premises" to include the parking garage, contrary to the terms of the Lease Agreement. It maintains based on each of these arguments that "[t]here is nothing in the Lease that speaks to the calculation of the taxes for the Parking Garage." It argues that this calculation is therefore a matter for 100 Bloor's discretion.

[50] I do not find these arguments to be persuasive.

[51] First, the distinction 100 Bloor offers between “attributing” realty taxes and “calculating” realty taxes is formalistic and unhelpful. It is not possible to attribute a share of realty taxes in a non-arbitrary and therefore reasonable way without doing calculations. The very direction to 100 Bloor in article 6.3 to use a “method of determination” necessarily contemplates a calculation. It was therefore open to the motion judge to conclude that article 6.3 applied to the entire method of determination, including the calculations that the method of determination involved.

[52] Second, the motion judge was also entitled to reject 100 Bloor’s submission that since article 6.3 addresses realty taxes attributable to the “Leased Premises”, article 6.3 does not apply to realty tax calculations involving the parking garage. This submission suffers the same infirmity. The Lease Agreement contemplated that the City of Toronto could issue a composite realty tax bill. If this were to occur, it would not be possible to determine Barry’s portion of those taxes without apportioning that total bill. Since Barry’s is not required under the Lease Agreement to pay anything for the realty taxes attributable to the parking garage, it would not be possible to attribute a non-arbitrary and reasonable portion of the realty taxes to Barry’s without determining the realty taxes attributable to the parking garage. As the motion judge aptly put it: “Calculation of the Tenant’s realty tax bill involves a single calculation exercise. That calculation has two parts:

calculating taxes attributable to the parking garage and then calculating taxes attributable to the Tenant's space."

[53] 100 Bloor also argued that article 2.1(vv) of the Lease Agreement, which defines "Proportionate Share" as the ratio or percentage of the area of the Leased Premises relative to the area of the retail space, supports its position. I agree with the motion judge that article 2.1(vv) is irrelevant. The term "Proportionate Share" does not apply to realty taxes, as article 5.3 makes clear.

[54] Therefore, I see no errors by the motion judge in interpreting article 6.3, let alone any extricable errors of law. On this basis alone, the appeal of the motion decision requires dismissal. For completeness I will continue and address the remaining ground of appeal, relating to the motion judge's reasonableness interpretation.

(3) The judge did not err in finding that 100 Bloor exercised its discretion unreasonably

[55] 100 Bloor argues that the motion judge erred in deciding that it did not act reasonably, by failing to give "any meaningful consideration" to its evidence and by giving short shrift to its expert evidence. It submitted before us that it provided a logical and coherent explanation which it described as a three-step method:

- Step 1 - 100 Bloor calculated the "exact value for the Parking Garage" using the agreed value derived from "the income valuation approach and the cost

per stall", and then multiplied that value by the "undisputed effective tax rate".

- Step 2 – 100 Bloor then deducted this amount as a line item from the total realty taxes payable. Its expert witness explained that it did this because the parking garage is not part of the retail space.
- Step 3 – 100 Bloor then assessed taxes for the Leased Premises using the remaining amount on a proportionate share basis.

[56] Relatedly, 100 Bloor also argues that the motion judge mischaracterized its position. It argues that it did not rely on the MPAC Current Value assessment of the parking garage as the motion judge found but relied instead on the amount the parties agreed to be the property value of the parking garage.

[57] Finally, it argues that in the commercial context of the relationship between two sophisticated parties, 100 Bloor was entitled to use its discretion to maximize its profits. It says the motion judge erred in finding that it acted unreasonably by doing so.

[58] I disagree with each of these submissions.

[59] First, the motion endorsement does not support 100 Bloor's contention that the motion judge failed to give its explanation reasonable consideration. The motion judge accurately described Step 1 relating to how 100 Bloor valued the parking garage component of the realty taxes, but he made two salient points:

- He accurately recognized that the valuation technique that 100 Bloor used was derived from MPAC's Current Value assessment. This being so, the motion judge was entitled to characterize 100 Bloor as having used a Current Value assessment in valuing the share of realty taxes attributable to the parking garage. He did not misapprehend the evidence.
- He also appreciated that Barry's had agreed to the property value attributable to the parking garage, but he recognized that Barry's never agreed to the mixing-and-matching of valuation methods, which was the issue in contention.

[60] In the circumstances, the motion judge was right to reject 100 Bloor's attempt to co-opt Barry's "agreement" to support its position.

[61] Second, it is equally clear that the motion judge considered and rejected Step 2 and Step 3 of 100 Bloor's approach. He did so by rejecting its submission that the definition of Leased Premises as a space within the Retail Component precluded the use of the same methodology to value the realty taxes attributable to the Leased Premises and the parking garage.

[62] The motion judge fully considered 100 Bloor's explanation. He simply rejected it, as he was entitled to do.

[63] Third, I would not accept 100 Bloor's related submission that the motion judge gave "short shrift" to its expert witness. The motion judge addressed the

substance of the expert evidence by rejecting the explanation the expert witness offered. He was under no obligation to address the expert evidence explicitly in his decision.

[64] Finally, I am not persuaded that the motion judge erred by relying on the fact that 100 Bloor was attempting to "come up with the maximum rate attributable to [Barry's]", in explaining why it had acted unreasonably. 100 Bloor contends that this was wrong because commercial parties are entitled to maximize their profits and "promote [themselves] at the expense of the other": see *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, [2021] 1 S.C.R. 32, at paras. 73-74. I disagree with this submission because the entitlement of commercial parties to maximize their profits does not permit them to fail to discharge their contractual obligations. Article 6.3 provides 100 Bloor with authority to "determine" Barry's "portion of Realty Taxes". But that is not what 100 Bloor did. Instead of endeavouring to determine Barry's "portion", it set out to identify an amount that would maximize what Barry's would have to pay. That is not what the parties could reasonably be taken to have intended to empower 100 Bloor to do.

[65] The motion judge did not err in finding that 100 Bloor acted unreasonably.

B. CONCLUSION ON THE MOTION APPEAL

[66] I would dismiss 100 Bloor's appeal of the motion decision.

THE COSTS APPEAL

[67] The motion judge ordered 100 Bloor to pay costs on a substantial indemnity basis for: (1) the interim injunction hearing and the application, in the amount of $462,102.60 plus $125,706.30 in disbursements for a total of $587,808.90, and (2) the motion, in the amount of $121,208.49 all-inclusive. The total costs award was therefore $709,017.39.

[68] On its face, this is a staggering costs award that is manifestly out of line with usual costs awards in comparable cases. It therefore warrants leave to appeal to enable appellate consideration of its appropriateness. I would grant that leave and allow the costs appeal. In my view, the judge made material errors when deciding to impose substantial indemnity costs. The costs award must, in fairness, be reduced. Even if the judge had not erred in awarding costs on a substantial indemnity basis, I would still have reduced the costs award because the costs claimed by Barry's are disproportionate and if awarded would have a chilling effect on litigation.

[69] I would therefore reduce the costs award to $300,000, inclusive of the legal costs for the interim injunction hearing, the motion, and the application, as well as disbursements and applicable taxes relating to the interim injunction hearing and the motion. I see no basis for interfering with the disbursements of $125,706.30 that the judge awarded for the application, primarily because 100 Bloor did not

launch an attack on any of the disbursements, including a concerning $80,000 disbursement for “Corporate Counsel”. I would therefore set aside the costs award below and order a total costs award inclusive of all disbursements and HST of $425,706.30.

A. THE MATERIAL LEGAL PRINCIPLES

[70] The material principles governing the appeal of a costs award are not in dispute:

- A costs award is “highly discretionary and entitled to significant appellate deference” thereby giving rise to a “very deferential standard of review”: *Apotex Inc. v. Eli Lilly Canada Inc.*, 2022 ONCA 587, at para. 56, leave to appeal refused, [2022] S.C.C.A. No. 387. The discretion to set costs is statutorily conferred on the court deciding the case: *Courts of Justice Act*, R.S.O. 1990, c. C-43, s. 131. The high degree of deference is required because of the privileged position of the judge, who is best situated after attending the proceeding and learning the subtleties of the case to determine the entitlement, scale, and quantum of the award, particularly where a highly fact-driven analysis is involved or credibility evaluations are required: *Apotex*, at para. 57; *Hamilton v. Open Window Bakery Ltd*., 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27; *McNaughton Automobiles Limited v. Co-*

operators General Insurance Company, 2008 ONCA 597, 95 O.R. (3d) 365, at para. 27.

- "A court should set aside a costs award on appeal only if the trial judge has made an error in principle or if the costs award is plainly wrong": *Hamilton*, at para. 27.
- It is a misapprehension of evidence to make findings based on mistakes as to the substance of the evidence, or a failure to give the evidence proper effect, where those errors go to the core of the outcome of the case: *Bayford v. Boese*, 2021 ONCA 442, 156 O.R. (3d) 241, at para. 28. If a judge awards costs based on a material misapprehension of the evidence, the costs award may be set aside: *Savage v. Belecque*, 2012 ONCA 426, 111 O.R. (3d) 309, at para. 44.
- If a costs award is set aside, the appellate court is authorized by s. 134 of the *Courts of Justice Act* to make any costs award the judge could have made.

[71] The parties take no issue with the principles that a judge should apply in awarding costs, which include:

- "The overarching objective is to fix an amount of costs that is objectively reasonable, fair, and proportionate … rather than to fix an amount based on the actual costs incurred" by the party entitled to costs: *Apotex*, at para. 61.

- "The party seeking costs bears the burden of proving them to be reasonable, fair, and proportionate": *Apotex*, at para. 66.
- "A proper costs assessment requires a court to undertake a critical examination of the relevant factors", including but not limited to the result in the proceedings and the other factors identified in r. 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194: *Apotex*, at para. 60. The court must then "step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable": *Apotex*, at para. 60, quoting *Restoule v. Canada (Attorney General)*, 2021 ONCA 779, 466 D.L.R. (4th) 2, at para. 356, citing *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (C.A.), at para. 24.
- The reasonable expectation of the parties concerning the amount of the costs award is an important factor: *Sky Clean Energy Ltd. (Sky Solar (Canada) Ltd.) v. Economical Mutual Insurance Company*, 2020 ONCA 558, 152 O.R. (3d) 159, at para. 119. Not all expectations are reasonable. Therefore, the expectations of the parties should not "overwhelm the analysis of what is objectively reasonable in the circumstances of the case": *Apotex*, at para. 62. Otherwise, the deeper pockets of the more affluent would artificially inflate costs, causing a "chilling effect on access to justice for less wealthy parties": *Apotex*, at para. 62. This would be contrary to the fundamental objective of the costs system, which exists to facilitate access

to justice: *Boucher*, at para. 37. “Although each costs assessment is a fact-driven exercise … the reasonableness of costs that represent an outlier must be objectively and carefully scrutinized, taking into account the chilling effect on litigation that this kind of award could have”: *Apotex*, at para. 63, citing *Boucher*, at para. 37.

- Costs awards may be elevated where the conduct of a party “lengthen[ed] unnecessarily the duration of the proceeding”, or was “improper, vexatious or unnecessary”: rr. 57.01(e)-(f)(i). A substantial indemnity costs award is justified if “the proceedings are clearly vexatious, frivolous, or an abuse of process” or there is egregious misconduct: *Lewis v. Lewis*, 2019 ONCA 690, 49 E.T.R. (4th) 175, at para. 17; *1588444 Ontario Ltd. v. State Farm Fire and Casualty Company*, 2017 ONCA 42, 135 O.R. (3d) 681, at para. 53.

B. THE ISSUES

[72] 100 Bloor raises what I would identify as three general objections to the costs order. It argues that the judge: (1) erred in characterizing the result of the proceedings; (2) erred in characterizing its conduct as “reprehensible”; and (3) unreasonably imposed an award of a magnitude that would create a “chilling effect”.

C. ANALYSIS

(1) The judge did not err in characterizing the result of the proceedings

[73] The judge found that Barry's was "in effect, entirely successful on the application". He recognized that 100 Bloor was "technically" successful on one of the application issues, relating to the reasonableness of using a Proportionate Share analysis to determine Barry's portion of the realty taxes, but he found that 100 Bloor would not benefit from this ruling. He concluded that now that it is resolved that 100 Bloor can use only one method to quantify Barry's portion of the realty taxes, if 100 Bloor is "acting in a financially rational manner", as it can be expected to do, it would opt to use the Current Value calculation that Barry's sought during the application instead of the Proportionate Value calculation that it won the right to use. The judge found that the calculation method that 100 Bloor won the right to use in the application would actually result in it paying a higher share of the realty tax bill than the Current Value assessment Barry's promoted. 100 Bloor has not demonstrated any error with this finding. There is no basis for interfering with the judge's conclusion that 100 Bloor's success at the application was only technical.

[74] 100 Bloor argues that the motion judge's characterization of Barry's success is also problematic because it was based in material part on his conclusion that

"[t]he main issue on the application before me was whether the Landlord was entitled to terminate the lease." 100 Bloor argues that the judge's treatment of the lease termination as the main issue is inconsistent with the position that he took in the application decision, where he said: "The principal issue between the parties involved the manner in which realty taxes would be allocated to the leased premises". In my view, there is no inconsistency, as both observations can be simultaneously true. The principal issue between the parties was the realty tax dispute. And that dispute became the basis for the eviction, which was the main issue in the application. Simply put, the issues 100 Bloor seeks to treat as distinct for the purpose of demonstrating inconsistency are in fact interconnected.

[75] The motion judge was entitled to conclude that Barry's was, in effect, entirely successful on the application.

(2) The judge erred in finding 100 Bloor's litigation conduct to be reprehensible

[76] The judge based his conclusion that 100 Bloor's litigation conduct was reprehensible and needlessly complicated the litigation on several findings. The key ones are as follows:

- The Real Motive Finding: 100 Bloor lured Barry's into a false sense of complacency about taxes and occupancy costs, and then changed course without notice and tried to evict 100 Bloor by devising a series of legal

arguments as a “ruse” to do so. This caused Barry’s to incur the costs of security guards for the Leased Premises, necessitated an expensive injunction, and made the application complex and unnecessarily long. The motion judge found that 100 Bloor’s “motivation to terminate the lease had nothing to do with tax calculations or unpaid occupancy costs. Rather, the Landlord had received a better offer for the Tenant’s premises”, as evidenced by the Letter of Intent with Harry Rosen.

- The Non-Disclosure Finding: 100 Bloor “pursued a strategy of slicing and dicing legal issues so that the court did not have the full picture” during the application. Had 100 Bloor disclosed “the full picture on the application of how [it would] calculate the Tenant’s tax liability, the issue could have been dealt with then and there and this entire motion would have been unnecessary.”
- The Pointless Motion Finding: 100 Bloor proceeded with the motion without advancing a “crisper or clearer explanation” for its position than it had during an earlier case conference, despite being cautioned that it would likely lose if it did not do so.

[77] 100 Bloor has offered multiple arguments for why these findings should be set aside. I need not address them all, because I accept its submission that there are material errors relating to these three findings.

(a) The Real Motive Finding

[78] I agree, in part, with 100 Bloor's submission that the judge's real motive finding is problematic. I will begin with the part of the finding that I do accept, and end with the parts I do not.

[79] I would not find that the judge lacked an evidentiary or logical basis for concluding that 100 Bloor lulled Barry's into a false sense of security before springing an eviction attempt on Barry's to replace it with a more lucrative tenant. 100 Blair permitted Barry's to pay a reduced rent while the total rent was uncertain during the tax appeal and the COVID-19 emergency, before suddenly delivering an unmeritorious Notice of Default on April 26, 2022, and attempting to evict Barry's nine days later. 100 Bloor's conduct prior to the Notice of Default is well supported in the evidence. It is also clear that a mere three days after 100 Bloor delivered that notice, it entered a formal Letter of Intent with a desirable prospective tenant. It was not unreasonable for the judge to infer on these facts, including the lack of merit in the grounds for eviction and the unreasonable demand for almost immediate payment, that the eviction attempt was motivated by the prospect of obtaining a preferred tenant. I find no error in this part of the judge's finding. However, this conduct, which relates to an issue in dispute in the litigation rather than to the conduct of the litigation, does not provide a basis for substantial indemnity costs. As discussed further below, I do not view this conduct as making the proceedings clearly vexatious, frivolous, or an abuse of process.

[80] The parts of the “real motive finding” that could have supported a substantial indemnity costs award are the ones that do not flow logically from the record, namely, the judge’s conclusion that “[t]he true underlying issue” during the application was “[c]an a landlord evict a tenant with a valid lease simply because the landlord has received a better offer for the premises?” and his associated holding that the application was therefore a “ruse”. The dispute between the parties relating to the quantification of the taxes was a real underlying issue that that had to be resolved, even had no eviction been attempted. Indeed, during the application hearing the judge appeared to recognize this after he was made aware of the Letter of Intent. He found in his application decision that ‘[t]here is no basis … for suggesting that the Landlord acted dishonestly or in bad faith when allocating taxes as it did”, and he noted that the tax allocation method that Barry’s was resisting was the one applied to other tenants with standard units. The fact is that Barry’s was not agreeing to pay the rent that 100 Bloor was demanding. There is no basis for concluding that 100 Bloor did not consider this to be a breach of the lease. Although 100 Bloor’s eviction attempt was high-handed, unfair, and driven by its desire for a preferable tenant, it does not follow that the either the application itself or the positions Barry was taking were a ruse. I would not defer to this part of the judge’s finding.

(b) The Non-Disclosure Finding

[81] I also agree with 100 Bloor that there was not a sufficient evidentiary foundation or logical basis for the judge's conclusion that 100 Bloor failed to give the court a full picture of its intentions during the application. That conclusion is predicated on the judge's finding that at the time of the application 100 Bloor had a fallback plan to switch to a Current Value assessment for the parking garage realty taxes if the judge ordered 100 Bloor to deduct them from Barry's share of the property taxes. However, there is no evidence to support this inference, only speculation. 100 Bloor took this position for the first time after the application decision was released. I would not defer to this finding, either.

(c) The Pointless Motion Finding

[82] Finally, I agree with 100 Bloor that in arriving at the pointless motion finding the judge ignored the principle of fairness. He did so by relying, as a reason for awarding elevated costs, on 100 Bloor's insistence in proceeding with the motion despite its failure to offer a "crisper or clearer explanation". Although it was appropriate for the judge, as a case conference judge, to encourage the parties to settle by cautioning 100 Bloor that it was likely to lose the anticipated motion unless it offered better submissions, 100 Bloor was entitled to oppose Barry's motion and obtain a formal ruling on its position.

[83] The shortcomings I have identified in the judge's reasoning relating to the reprehensibility of 100 Bloor's litigation conduct materially undercut his decision to award costs on a substantial indemnity basis. I would not defer to his decision to do so and would reduce the costs award accordingly.

(3) The judge unreasonably imposed an award of a magnitude that would create a chilling effect

[84] Even if I had not found substantial indemnity costs to be inappropriate, I would have reduced the quantum of the award that the motion judge imposed as plainly wrong. I appreciate that the judge considered the proportionality principle, turned his mind to the reasonableness of the award, and had the benefit of observing the procedures to gauge their complexity. But in my view a costs award for legal fees, without disbursements, of $583,311.09 for three related proceedings arising from this commercial landlord and tenant dispute is: (1) disproportionate; (2) cannot be said to have been *reasonably* anticipated by the parties; and (3) can only discourage litigation and harm the principle of access to justice.

[85] In terms of proportionality, the legal issues at stake in this case were not complex enough to warrant the costs that were ordered. This case was essentially a disagreement over the interpretation of a lease agreement, concerning how a portion of the rent should be calculated and whether the tenant's payments satisfied the lease obligations. It turned on a largely settled factual record. The

documentary record was sizable, but certainly not extensive. The expert evidence had some complexity, but it was focused and readily understandable. The application and motions did not require significant court time. And the financial stakes reflected by the competing positions of the parties were not particularly high. According to the judge's own finding, there was $179,000 per year at stake. I appreciate that the litigation took on additional importance to Barry's because success by 100 Bloor would have deprived Barry's of the benefit of the remainder of a ten-year lease at a prime location where it had invested heavily in infrastructure. Even bearing this in mind, the total costs awarded are disproportionate to the litigation and what was at stake.

[86] Barry's bill of costs is problematic, on its face. The number of lawyers and the hours spent per task are concerning. Seven lawyers contributed more than 200 hours to Barry's initial application and interim injunction motion, not including preparation for argument and submissions. Four lawyers spent close to 300 hours reviewing 100 Bloor's application record, preparing the responding record, and conducting the limited cross-examinations that took place prior to the motion hearing. I am persuaded that even applying large Toronto firm rates, and expecting first-rate work, the amount expended on the ligation could not reasonably have been anticipated. There is clearly duplication of work between the various lawyers on the file, resulting in an exorbitant number of hours being claimed. For its part,

100 Bloor sought combined costs on a partial indemnity basis of $166,032.40.[6] It is not reasonably foreseeable in the circumstances that Barry's would seek costs at more than three times that rate, even on a substantial indemnity basis. It is worth repeating the comments made by Roberts J.A. in *Apotex*, at para. 65:

> Costs that are reasonable, fair, and proportionate for a party to pay in the circumstances of the case should reflect what is reasonably predicable and warranted for the type of activity undertaken in the circumstances of the case, rather than the amount of time that a party's lawyer is willing or permitted to expend.

[87] To be sure, this was acrimonious, pull-out-all-the-stops litigation between two well-heeled litigants that were highly motivated to succeed. But that cannot drive the costs assessment.

[88] Finally, the costs award, if upheld, would have a chilling effect on litigation. The words of Armstrong J.A. in *Boucher*, at para. 37, apply here:

> There are obviously cases where the prospect of an award of costs against the losing party will operate as a reality check for the litigant and assist in discouraging frivolous or unnecessary litigation. However, in my view, the chilling effect of a costs award of the magnitude of the award in this case generally exceeds any fair and reasonable expectation of the parties.

[6] Consisting of $126,470.65 inclusive of disbursements for the application and injunction, plus $39,561.75 in fees and disbursements, applicable taxes included, for the motion.

[89] The judge was openly intent on sending a message to 100 Bloor, but there is no indication that he considered the chilling effect of the award he was rendering. I would not defer to his quantification of the costs award.

[90] I would therefore order costs for all proceedings below in the cumulative amount of $300,000. Given the nature of the issues, the complexity of the case, and the hearings that were conducted, this still strikes me as a highly generous costs award. But without more detailed submissions relating to the individual components of the bill of costs I refrain from reducing the costs further.

[91] I would not interfere with the disbursements of $125,706.30 that the judge ordered to be paid for the application, although I do have concerns relating to the $80,000 disbursement for “Corporate Counsel”. Payment to corporate counsel is not an item that is listed in the tariffs for appropriate disbursements. Absent exceptional or unusual circumstances, or an order of the court, and unless supported by dockets, costs outlines, and submissions, legal fees paid to other lawyers should not be included in a bill of costs as disbursements: see *Baiden v. Vancouver Police Department*, 2010 BCCA 375, 322 D.L.R. (4th) 474, at para. 25; *Fairhurst v. Anglo American PLC*, 2014 BCSC 827, at paras. 19-20; *Paulpillai v. Yusuf,* 2020 ONSC 3377, 58 E.T.R. (4th) 217, at paras. 44-45; *Hokhold v. Gerbrandt*, 2016 BCCA 5, 381 B.C.A.C. 228 (Registrar), at para. 46. This disbursement was not particularized or backed by supporting documentation in the materials filed for the appeal. However, it was not raised by 100 Bloor before us

nor was it addressed in the materials that were filed, and it may have been addressed orally and informally before the judge. He made no comments about the disbursements and accepted the figure of $125,706.30. In these circumstances, it would not be appropriate for me to intervene.

DISPOSITION

[92] I would dismiss 100 Bloor's appeal of the motion decision. I would grant leave to 100 Bloor to appeal the costs order, allow the costs appeal, and set aside the costs order below. I would substitute a costs order below in the amount of $300,000 plus $125,706.30 in disbursements, inclusive of applicable taxes.

[93] The parties have expressed their expectation that they will agree on the costs of this appeal. If a costs order is sought, the parties are requested to advise the court of the agreed upon amount within 30 days of the release of this decision. The parties should also notify the court within that same time frame if they cannot agree on the costs of the appeal.

Released: June 20, 2025 "D.M.P."

"David M. Paciocco J.A."
"I agree. P.J. Monahan J.A."
"I agree. D.A. Wilson J.A."