

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
)  
MALLEUM REAL ESTATE )  
MANAGEMENT CORP. and MALLEUM ) Bevin Shores, for the Plaintiffs/Defendants  
REAL ESTATE PARTNERS V LP ) to Counterclaim  
)  
Plaintiffs/Defendants to Counterclaim )  
)  
– and – )  
)  
DONUT MONSTER INC. and REUBEN )  
VANDERKWAAK ) George Limberis and Kevin Mitchell, for the  
Defendants/Plaintiffs by Counterclaim ) Defendants/Plaintiffs by Counterclaim  
)  
)  
)  
) **HEARD:** November 25, 26, 27 and 28,  
December 5 and 6, 2024, January 6, 7, 8, 9  
and 13, 2025

2025 ONSC 3997 (CanLII)

**REASONS FOR JUDGMENT**

**JUSTICE L. SHEARD**

**Overview**

- [1] The plaintiffs, Malleum Real Estate Management Corp. (“Malleum” or the “Landlord”) and Malleum Real Estate Partners V LP (the “Owner”), sue for damages arising from the alleged breach of a commercial lease (the “Lease”) of the corner, ground-floor unit (the “Premises”) of 152 to 154 James Street North, Hamilton, ON, L8R 2K8 (the “Property”).
- [2] The defendants are Donut Monster Inc., the tenant under the Lease (“DM” or the “Tenant”), and DM’s president, Reuben Vanderkwaak, who signed an Indemnity Agreement, whereby he agreed to be jointly and severally liable with the Tenant for all obligations under the Lease.
- [3] The parties agree that a central issue to be determined relates to the interpretation of the Lease. Specifically, the court is asked to determine if March 1, 2020 is the commencement

for the Tenant's six-week rent-free fixturing period (the "Fixturing Period") and obligation to take occupancy of the Premises. Alternatively, should the Lease be interpreted to infer that the commencement date(s) were conditional or contingent upon the Landlord's completion of the Landlord Improvements (Lease, Appendix A), sometimes referred to as the "Landlord's Work"

- [4] The Defendants counterclaimed, seeking damages and rescission of the Lease and the Indemnity Agreement. They allege that the Landlord repudiated the Lease and/or made innocent, intentional, or fraudulent misrepresentations that the Landlord Improvements could and would be completed by March 1, 2020, which did not happen, and/or that the Tenant's obligations under the Lease were contingent upon the timely completion of the Landlord Improvements.
- [5] The Tenant was given keys well prior to March 1, 2020 but never moved its business into the Premises. On May 20, 2020, the Tenant delivered a "Notice of Frustration and Corresponding Abandonment of Lease" (the "Notice"), in which it asserted that the Lease had been terminated.
- [6] The Landlord subsequently secured a new tenant, at a lower rent, and on November 24, 2023, sold the Property.

**Issues to be decided:**

- [7] After the trial evidence was complete, the parties submitted written closing submissions (the "Trial Submissions"), which identified the following issues to be determined:
  - 1. What does the Lease say?
  - 2. Did the Tenant breach or repudiate the Lease?
  - 3. Did the Landlord breach or repudiate the Lease or make the misrepresentations as alleged in the Counterclaim?
  - 4. If the Landlord breached or repudiated the Lease and/or made the misrepresentations as alleged is the Tenant entitled to rescission of the Lease and/or damages?
  - 5. If the Tenant breached/repudiated the Lease, what are the plaintiffs' damages?

**Issue #1: Was does the Lease say?**

***Position of the plaintiffs:***

- [8] The plaintiffs submit that the Lease speaks for itself. Their position is that:

The Lease provided that the Commencement Date of the Lease, the date the Tenant was required to take occupancy of the Premises, and the start of the rent-free Fixturing Period, were all March 1, 2020.

None of these dates were contingent upon completion of the Landlord Improvements, or any other factors: (plaintiffs' Trial Submissions, para. 13.)

- [9] The plaintiffs submit that the terms of the Lease should govern, and, in particular, the following key clauses: 1) Entire Agreement; 2) Landlord Improvements; 3) Occupancy and Commencement of Business; and 4) Fixturing Period: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 (CanLII) ("*Sattva*"), at para. 47.
- [10] The plaintiffs further submit that there is no ambiguity in the Lease that would allow words or terms to be inferred into it or to override the plain wording of the Lease. On the same basis, the *contra proferentum* rule has no application here.
- [11] The plaintiffs say that the Lease reflects and embodies the agreement negotiated by the parties. They submit that there is no evidence that the Tenant requested, or the Landlord promised, that the Landlord Improvements would be completed by March 1, 2020, or by any specified date. The plaintiffs also say that there is no evidence that the parties agreed that the commencement date of either the Fixturing Period or the Tenant's occupancy was conditional.

### ***Position of the Defendants***

- [12] The defendants acknowledge that the Lease does not include an end date for the completion of the Landlord Improvements but submit that the Lease should be interpreted to provide that:

...the Lease commenced as of March 1, 2020, which is the date by which the Landlord's Work was to be completed. Furthermore, to the extent that the Landlord's Work wasn't completed by March 1, 2020, it was at all times up to the Tenant to decide whether such a reasonable extension should be granted to Malleum (Defendants' Trial Submissions, at para. 60).

- [13] The defendants rely upon two Ontario Court of Appeal decisions which follow *Sattva: Weyerhaeuser Company Limited v. Ontario (Attorney General)*, 2017 ONCA 1007 (CanLII), at para. 65 ("*Weyerhaeuser*"), and *Prism Resources Inc. v. Detour Gold Corporation*, 2022 ONCA 326 (CanLII).

### **Statement of Agreed Facts**

- [14] The parties filed a Statement of Agreed Facts ("SAF"), which is summarized, in part, below:

#### ***The Lease***

- (i) The Lease was entered into on November 19, 2019;

- (ii) The material terms of the Lease include, but are not limited to, the following:
- (a) **Term:** the Lease term is 10 years, from March 1, 2020 (“Commencement Date”) to February 28, 2030;
  - (b) **Rent:** the minimum rent is \$60,000 per year plus HST, payable monthly; to be increased by 2.5% annually;
  - (c) **Fixturing Period:** the Tenant is entitled to a six-week fixturing period, commencing March 1, 2020, for the purpose of construction of Leasehold Improvements and installation of fixtures, equipment and furnishings, or other permitted use in accordance with the Lease. During the Fixturing Period, the Tenant shall not be responsible for payment of Basic Rent but shall pay for the cost of all utilities supplied to the Premises and shall otherwise be bound by all of the provisions of the Lease, including without limitation, the obligation to maintain the insurance required by the terms of the Lease;
  - (d) **Interest:** interest on arrears of rent accrues at 1.5% per month plus a minimum charge of \$100 for each occurrence of failure to pay;
  - (e) **Occupation and Commencement of Business:** The Tenant agrees that to commence its business in the Premises on, or prior to, March 1, 2020, and thereafter to continuously, actively and diligently operate its business in the whole of the Premises in a reputable manner in compliance with the provisions of the Lease and the requirements of all applicable governmental laws and regulations. The Tenant shall at its own expense be responsible for obtaining any occupancy and/or building permits for its use and the Premises required by the municipal government or any other government authority, other than the initial permit included in the Landlord’s Work outlined in Appendix A;
  - (f) **Quiet Enjoyment:** if the Tenant pays the rent and performs the covenants herein on its part contained, it shall and may peaceably possess and enjoy the Premises for the term hereby granted without any interruption or disturbance from the Landlord or any other person or persons lawfully claiming by, form or under it; provided that the Landlord and their agent shall have the right to enter upon the Premises at reasonable times to show such premises to prospective purchasers, encumbrances, Tenants or assignees;
  - (g) **Entire Agreement:** This Agreement and the schedules hereto: (i) constitutes the entire agreement; there are no representations, covenants, or other terms other than those set out in this Agreement, and (ii) supersedes any previous discussions, negotiations, understandings, or agreements, between the parties, oral or written, relating to its subject matter;
  - (h) **Force Majeure:** In the event that the Landlord is delayed or prevented from completing any obligation to the Tenant, including all obligations under this

Agreement, by reason of strikes, lockouts, unavailability of materials, failure of power, restrictive governmental laws or regulations, riots, insurrections, war, or other reason beyond its control, then the completion date of such obligation shall be postponed for the period of the delay and the period for the substantial completion of such obligation shall be extended for a period equivalent of such delay;

- (i) **Appendix A: Landlord Improvements:** The improvements to the Premises that the Landlord agrees to perform, are to be determined, upon execution of the Lease.

[The SAF is not reproduced here in detail. Stated broadly, the Landlord Improvements contemplated renovations to the Premises needed to accommodate the restaurant and bar that DM anticipated opening. The renovations included such things as plumbing (new bathrooms), electrical wiring, HVAC, lighting, walls and ceiling finishes, some new windows and doors and signage.]

- (iii) **Communications prior to signing of the Lease:** At various points leading to the execution of the Lease, Mr. Vanderkwaak and representatives for the plaintiffs, including, but not limited to, Tyler Pearson, had various discussions and/or communications.
- (iv) **Letter of Intent:** Prior to executing the Lease, on October 9, 2019, Mr. Pearson sent Mr. Vanderkwaak a Letter of Intent for his review, which Mr. Vanderkwaak signed back on October 19, 2019 (the “LOI”).
- (v) **Building Permit:** Pursuant to the Lease, the Landlord was obligated to obtain the building permit in respect of the Landlord Improvements. On February 20, 2020, the Landlord submitted an application for a building permit for the build-out at the Premises, which included the Landlord Improvements. The building permit was issued on June 19, 2020 (the “Permit”).

#### ***Events Following the Execution of the Lease***

- (vi) Between November 29, 2019 and April 2, 2020, the Landlord and Tenant communicated by email. Among other things, they discussed the Landlord Improvements, which required the Tenant’s input. For example, input was needed as to the type and location of the rough-ins for electrical/lighting and plumbing; the floorplan layout; washroom fit-outs; and flooring choice.
- (vii) While the Landlord waited for the Permit to be issued, it commenced work on the portion of the Landlord Improvements that could be completed without the Permit.
- (viii) On March 20, 2020, the Landlord’s subcontractor, Newfore, emailed a project timeline for the completion of Landlord Improvements to the Tenant. It indicated that the Landlord Improvements were projected to take 24 working days to complete, subject

to updates. The Schedule outlined certain components of the Landlord Improvements which could not be completed until after the issuance of the Permit.

- (ix) On March 17, 2020, the Province of Ontario declared a state of emergency due to the COVID-19 pandemic. With respect to the operation of bars and restaurants, O. Reg. 51/20, s.5, in effect between March 23, 2020 and April 15, 2020, ordered the closure of “[a]ll bars and restaurants, except to the extent that such facilities provide[d] takeout food and delivery”.
- (x) Effective April 4, 2020, O. Reg. 82/20, as amended by O. Reg. 119/20, required the stoppage of non-essential commercial work. Restaurants were permitted to operate for take-out, drive-through, and delivery service only.
- (xi) Between April 4, 2020 and May 19, 2020, the Landlord was required to stop work on the Landlord Improvements. Restrictions on construction work were lifted effective May 19, 2020, pursuant to O. Reg. 82/20.

### ***End of Lease***

- (xii) In late March and early April 2020, Mr. Vanderkwaak and Mr. Pearson had communications and/or discussions about the Lease and the Landlord Improvements. On May 20, 2020, DM’s lawyers sent the Notice to the Landlord.
- (xiii) On September 15, 2020, the Landlord’s lawyers sent a letter to DM’s lawyers offering to defer the commencement of the Lease term and the Fixturing Period from March 1, 2020 to August 1, 2020.
- (xiv) On September 28, 2020, the Tenant sent an email from its lawyer to the lawyer for the Landlord refusing this proposal and indicating its reliance on the Notice.

### ***New Lease***

- (xv) The Premises were listed for rent on MLS August 18, 2020. The Landlord leased the Premises to Lauren Ricottone o/a Bichette (the “New Tenant”). The New Tenant operated a retail clothing store;
- (xvi) The New Tenant’s Lease (the “Mitigating Lease”) was executed April 9, 2021, and its material terms include the following:
  - (a) **Term:** the term is to be 5 years, from August 1, 2021 (“Commencement Date”) to July 31, 2026 (Clause 2.0);
  - (b) **Right of Renewal:** the New Tenant shall have the right to extend the Lease for two additional two five-year terms with the rental rate for the first year of the renewal periods to be subject to a maximum 10% increase or decrease relative to the rate within the final month prior to the renewal (Clause 6.0);
  - (c) **Rent:** the minimum rent was to be \$45,600 per year plus HST, payable in

monthly installments; with a 3.0% escalator each year during the term (Clause 4.0);

- (d) **Fixturing Period:** the New Tenant is entitled to a fixturing period commencing April 1, 2021, during which the New Tenant is provided possession of the Premises, but is not obliged to pay rent (Clause 12.0). This Clause also provides a \$40,000 plus HST allowance to the New Tenant related to any physical capital improvements to the Premises undertaken by the New Tenant.
- (xvii) Effective February 26, 2024, without changing the term or the rent in the Mitigating Lease, the New Tenant assigned the Mitigating Lease to Norm and Lee Retail Corp. on terms set forth in a written Assignment of Lease.

### ***Sale of the Premises***

- (xviii) On May 4, 2023, the Owner and Malleum Real Estate Partners V GP Limited (the “Sellers”) entered into a Listing Agreement for the sale of the Property;
- (xix) On November 24, 2023, the Sellers entered into a conditional Agreement of Purchase and Sale (the “APS”) with Ali Honarmand (the “Buyer”) to sell the Property at a purchase price of \$2,950,000.00 CAD with a closing date of February 28, 2024, later amended to March 29, 2024. The sale of the Property closed on April 10, 2024.

### **Evidence at Trial**

- [15] The plaintiffs’ main fact witness was Mr. Pearson, president of Malleum and the secretary and a director of the Owner. Mr. Pearson was the main point of contact between the plaintiffs and the defendants. The plaintiffs also called Dave Clayton of Malleum Development Corporation, an entity related to the plaintiffs, to give evidence about the Landlord’s Work performed.
- [16] Mr. Pearson testified that much of the communication with the Tenant was via email. While there were some in-person meetings, neither Mr. Pearson, nor Mr. Vanderkwaak, made any notes of these.
- [17] The plaintiffs submit, and I accept, that the most reliable evidence as to what was communicated and agreed to between the parties is found in the: 1) emails exchanged; 2) the LOI; and 3) the Lease itself.
- [18] The defendants’ fact witness was Mr. Vanderkwaak, who spoke for the Tenant.
- [19] Each side called expert evidence on damages.

### **Findings of Fact**

- [20] In addition to the facts set out in the SAF, I make the following findings of fact, based on the trial evidence as a whole:

*Negotiations preceding the Lease*

- [21] Mr. Vanderkwaak was the controlling mind of DM. DM operated a successful donut business on Locke Street and Mr. Vanderkwaak had aspirations of expanding the business to this new location on James St. North, to operate a restaurant and licensed bar. Mr. Vanderkwaak was competing for the Premises with another potential tenant.
- [22] By September 29, 2019, Mr. Vanderkwaak had determined that, if renovated, the Premises would suit DM's expansion plans. The renovations required significant changes to the existing retail space, such as the installation of new and upgraded wiring, plumbing, flooring, main floor bathrooms, etc. Also, the Tenant would need to install whatever fixtures it required for the operation of the bar and restaurant.
- [23] Mr. Vanderkwaak had experience with the City of Hamilton converting retail spaces to include commercial kitchens. For example, in 2018, he had converted retail space on Locke Street to accommodate DM's donut shop operations.
- [24] From his experience, Mr. Vanderkwaak understood that such renovations could encounter delays and that "setting a timeline" for the completion of the construction could be difficult. For example, Mr. Vanderkwaak, had experienced delays in the completion of the Locke Street space because of a holiday closure.
- [25] Mr. Vanderkwaak also had experience applying for building permits from the City of Hamilton and understood that the date on which the City issued a permit was beyond the control of the applicant.
- [26] Mr. Vanderkwaak did not wish to undertake the permitting process, nor the renovations to the Premises himself. Both to secure the Premises and the Landlord's commitment to undertake the renovations, Mr. Vanderkwaak offered to pay \$500 more in rent per month than had been asked for by the Landlord.

***The LOI***

- [27] Negotiations progressed and the Landlord prepared the LOI described as a "non-binding agreement", which would be used to "facilitate a binding commercial lease".
- [28] The LOI set out the following key terms to be incorporated:
- (i) DM would use the Premises for a restaurant and licensed bar;
  - (ii) the lease term would commence on March 1, 2020, for a term of 120 months (10 years) at a monthly gross rent of \$5,000 plus HST with an annual 2.5% escalator;
  - (iii) two options to renew the lease for an additional 60-month term;
  - (iv) the Tenant was entitled to take possession of the Premises from and after March 1, 2020 for the purpose of construction of leasehold improvements and installation of

fixtures, equipment and furnishings during which. The Tenant would not be required to pay rent but only pay the cost of utilities supplied to the Premises; and

- (v) the Landlord agreed to complete the “high-level” scope of work, which was outlined in Schedule A, to be further outlined in the Lease.

- [29] Mr. Pearson sent a draft of the LOI to Mr. Vanderkwaak and invited him to let him know “if you feel I have forgotten a primary deal point or would like to make any edits”.
- [30] Mr. Vanderkwaak confirmed that he received and reviewed the LOI and responded that “this document looks pretty comprehensive of our discussions, in person...” Although he had a question concerning the bathroom budget, Mr. Vanderkwaak signed and returned the LOI, as presented.

### ***The Landlord Improvements***

- [31] I accept the Landlord’s evidence that it did not have control over when Landlord Improvements could be completed. Not only did the Landlord require cooperation and input from the Tenant to complete its work (SAF, at para 12), but to complete or “close” the Permit, a final inspection by the City had to be conducted *after* the Tenant’s fixtures had been connected to the electrical and plumbing hook-ups. In other words, the Landlord Improvements could not be completed unless and until the Tenant’s fixtures were installed.
- [32] Mr. Pearson told Mr. Vanderkwaak that Landlord would *try* to complete its work by March 1, 2020. Important to the issues here, the Tenant did not ask the Landlord to commit to a completion date, nor did the Landlord promise that the work would be completed by March 1, 2020, or by any specified date. In addition, the Tenant did not ask, nor did the Landlord agree, that the start date of the Lease be “pushed out” should the Landlord Improvements not be completed by March 1, 2020.
- [33] Mr. Vanderkwaak testified at trial that it was important for DM’s business to be up and running by early summer. He also testified that he “understood” from his discussions with the Landlord that DM would not be required to take occupancy unless and until the Landlord Improvements had been completed.
- [34] I do not accept this testimony. It is not supported by the evidence in that:
  - (1) the defendants were unable to point to any written communication confirming Mr. Vanderkwaak’s assertion that the Landlord had promised or represented to him that the Landlord Improvements would be completed by March 1, 2020;
  - (2) there was nothing in writing to support Mr. Vanderkwaak’s assertion that the commencement date of the Lease was conditional upon the completion of the Landlord Improvements; this is not mentioned in the LOI, nor in the Lease. In this regard, I note that:

- a. although invited to comment and suggest changes to the LOI, Mr. Vanderkwaak chose not to make any changes and signed the LOI as presented by the Landlord; and
  - b. following the execution of the LOI, the parties proceeded to negotiate the terms of the Lease through email. Absent from these communications is any mention by Mr. Vanderkwaak of his belief or understanding that the commencement date of the Lease was contingent upon the completion of the Landlord Improvements and/or that the Tenant would not be required to take occupancy until the Landlord's Work was completed; and
- (3) the first time Mr. Vanderkwaak communicated his "assumption" that the commencement of the Fixturing Period and the Lease would not be until the Landlord Improvements were complete, was in his April 1, 2020 email to Mr. Pearson. This email was sent *after* the COVID-19 shutdowns had begun and was in the context of Mr. Vanderkwaak's request to delay occupancy and the opening date of the business until governmental restrictions had passed and the Tenant's proposed business was allowed to operate as planned.

***The Lease***

- [35] Mr. Pearson emailed a draft lease to Mr. Vanderkwaak and invited him to review it with his advisors.
- [36] By email dated November 7, 2019, Mr. Vanderkwaak responded to Mr. Pearson, confirming that he had done a "full review" of the Lease and asking for clarification of certain points in the Lease.
- [37] Mr. Vanderkwaak did not request any changes to, or clarifications of, the Lease term; the commencement date of the Lease; the occupancy date; or the commencement of the Fixturing Period.

***The Lease embodies the agreement reached by the parties.***

- [38] I find that the Lease does, in fact, embody what was agreed to by the parties. In making that finding, I have considered Mr. Vanderkwaak's testimony referred to above, respecting the changes to the Lease he did, and did not, request.
- [39] I have also considered that each one of Mr. Vanderkwaak's requested changes to the Lease was accepted by the Landlord and incorporated into the Lease. On November 8, 2019, without further question or comment, Mr. Vanderkwaak then executed the Lease, as revised, and the Indemnity Agreement. On November 9, 2019, the Landlord countersigned the Lease.
- [40] I have also considered Mr. Pearson's evidence.

- [41] In cross-examination, Mr. Pearson was asked about internal discussions he had had with the Landlord’s team respecting the draft lease and his note asking whether the lease should specify when the Fixturing Period should end. Mr. Pearson’s note read: “Is it when the buildout is completed, or when the tenant is ready to open (there could be some time in between these dates.)”
- [42] I accept Mr. Pearson’s evidence that his comments simply reflected terms that the Landlord had previously offered to other commercial tenants. He also testified that his suggestion was “quickly shut down” by his business partner and CFO who told him that the Landlord had been “burnt multiple times signing up for these types of agreements”.
- [43] In my view, evidence of the Landlord’s internal discussions does establish or provide proof that the Landlord was aware that the question posed by Mr. Pearson to his team should have been addressed in the Lease. Nor do I infer any bad faith or misrepresentation on the part of the Landlord for failing to raise this, or any other, issue that may, or may not, have been important to the Tenant.
- [44] In my view, it was up to the Tenant to raise issues important to the Tenant in its negotiations with the Landlord; it was not the Landlord’s obligation to guess what provisions might be important to the Tenant.
- [45] Mr. Vanderkwaak’s evidence is unequivocal: he did not ask that the Lease contain a provision extending the Fixturing Period to the date on which the Tenant was ready to open for business, neither did he ask the Landlord for, nor was he promised, a firm completion date for the Landlord Improvements.
- [46] I accept Mr. Pearson’s evidence that the Landlord wanted the Lease to be clear as to when the Fixturing Period would end. The Landlord was already taking all the financial risk of the “buildout” and did not wish to commit to the “timing risk”, by committing to a firm date for the completion of the Landlord’s Work. Mr. Pearson knew the Landlord could not ensure the date on which this would be completed, given the uncertainty about when the Permit would be issued, and that the Landlord needed the cooperation of the Tenant to complete the Permit.
- [47] Moreover, I accept Mr. Pearson’s evidence that he told Mr. Vanderkwaak that while the Landlord would work as quickly as possible to obtain the Permit and complete the Landlord’s Work, the Landlord could *not* commit to a fixed completion date.
- [48] As noted above, I find that the Landlord’s internal discussions have no bearing on the interpretation of the Lease.
- [49] I also find that this evidence does not support the defendants’ position that the only commercially reasonable interpretation, is that the Landlord’s Work “needed to be completed on or before March 1, 2020, the occupancy date under the Lease, at which point Donut Monster was entitled to have the unit it bargained for” (Defendants’ Trial Submissions, at para. 2).

### **Contractual Interpretation**

[50] The parties agree that *Sattva* is the starting point on the proper approach to contract interpretation. Para. 47 of *Sattva* reads:

“... a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

No contracts are made in a vacuum: there is always a setting in which they have to be placed... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating. [*Reardon Smith Line Ltd. v Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.), at p. 574]

[51] At para. 57, the Court stated:

While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and *Hall*, at p. 30). The goal of examining such evidence is to deepen a decision-maker’s understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (*Hall*, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

[Emphasis added.]

[52] In *Weyerhaeuser*, the court acknowledged and expanded upon *Sattva*, and, at para. 65, summarized the general principles to guide adjudicators on how to interpret a commercial contract:

When interpreting a contract, an adjudicator should:

- (i) determine the intention of the parties in accordance with the language they have used in the written document, based upon the "cardinal presumption" that they have intended what they have said;
- (ii) read the text of the written agreement as a whole, giving the words used their ordinary and grammatical meaning, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
- (iii) read the contract in the context of the surrounding circumstances known to the parties at the time of the formation of the contract. The surrounding circumstances, or factual matrix, include facts that were known or reasonably capable of being known by the parties when they entered into the written agreement, such as facts concerning the genesis of the agreement, its purpose, and the commercial context in which the agreement was made. However, the factual matrix cannot include evidence about the subjective intention of the parties; and
- (iv) read the text in a fashion that accords with sound commercial principles and good business sense, avoiding a commercially absurd result, objectively assessed.

### **Analysis of Issue #1: What does the Lease say?**

#### **Interpretation of the Lease**

[53] In interpreting the Lease, I have considered and applied the *Sattva/Weyerhaeuser* factors to the evidence and the facts as I found them.

#### ***Factor #1: The intention of the parties in accordance the language used in the Lease***

[54] Under this factor, I find that the intention of the parties in accordance the language they used in the Lease, was that:

- (i) the Lease was to commence on March 1, 2020, for a term of 10 years (**Cl. 2**);
- (ii) the minimum rent ("Basic Rent") for the lease period payable by the Tenant is as set out at **Cl. 5**;
- (iii) the Tenant was to commence business in the Premises on March 1, 2020 (**Cl. 13**). This date is not conditional;

- (iv) the Fixturing Period was not conditional and was to commence on March 1, 2020 (Cl. 14);
- (v) no deadline was set for the Landlord’s completion of the repairs and upgrades outlined in Appendix A (Cl. 21.0) it was obligated to perform;
- (vi) if the Tenant abandoned the Premises, the Landlord might re-enter and take possession of the Premises and “accelerated rent” shall be recoverable by the Landlord as if it were rent in arrears (Cl.26.0 (c));
- (vii) Cl. 27 contemplates the Landlord entering the Premises *after* the Tenant’s occupation to make repairs, alterations, improvements or additions and if these cause “temporary obstruction” of the Premises or interrupt or suspend the supply of electricity, water or other services there is no abatement in rent, provided the work is done as expeditiously as is reasonably possible;
- (viii) in the Entire Agreement clause (Cl. 39.0), the parties agreed that the Lease embodied their agreement and that the Lease would supersede “any previous discussions, negotiations, understandings, or agreements, between the parties, oral or written, relating to its subject matter”.; and
- (ix) in the Force Majeure Clause, (Cl. 40,) the parties agreed that if the Landlord were delayed or prevented from completing any obligation to the Tenant, including all obligations under the Lease, by reason of...restrictive governmental laws or regulations...or other reason beyond its control, then the completion date of such obligation shall be postponed for the period of the delay and the period for the substantial completion of such obligation shall be extended for a period equivalent to the period of such delay.

**Factor #2:** *Read as a whole, giving the words in the Lease their ordinary and grammatical meaning, and avoiding an interpretation that would render any of its terms ineffective*

[55] The defendants submit that an end date for the completion of the Landlord’s Work must be inferred in the Lease; to read it otherwise, would provide the Landlord with an “indefinite period of time in which to do the work” and/or would serve “to suspend Malleum’s obligation to provide the Premises fit for the” Tenant’s purposes.

[56] I do not accept that submission.

[57] The defendants’ suggestion speculates that the Landlord could deliberately and indefinitely breach its obligations under the Lease, without consequence. The defendants’ submissions ignore Cl. 21, which imposes an obligation upon Malleum to complete the repairs and upgrades set out in Appendix A.

- [58] The defendants' submissions would also be contrary to a fundamental legal principle that parties to a contract are subject to a duty of good faith and honest performance of their contractual obligations: *Bhasin v. Hrynew*, 2014 SCC 71 (CanLII).
- [59] When read as a whole, I conclude that the Lease should *not* be interpreted in a way that includes an end date for the completion of Landlord Improvements. I further find that the dates in the Lease for commencement of the Lease, the Tenant's occupancy date and the Fixturing Period are not conditional: they are as stated, March 1, 2020.

**Factor #3: *Read in the context of the surrounding circumstances or factual matrix***

- [60] The defendants submit that when read in the context of the surrounding circumstances or factual matrix known to the parties, including the commercial context in which the Lease was made, the Lease should be interpreted to include a term that the Tenant's obligation to take possession of the Premises by a stated date is conditional upon the completion of the Landlord Improvements.
- [61] I do not agree.
- [62] The defendants understood that the issuance of the Permit was beyond the Landlord's control. They also understood that the completion of the Landlord Improvements depended on when, or if, Tenant provided the Landlord with its floorplan, flooring tile choice, placement of its light fixtures and other fixtures, and other Tenant decisions. I find that the defendant knew that the Landlord could not, and **did not**, commit to a firm date for the completion of the Landlord Improvements.
- [63] In addition, when the Lease was being negotiated, the parties knew that Landlord Improvements could not be completed *prior* to the commencement of the Fixturing Period because the work covered by the Permit required that the Tenant's fixtures be *connected* to the electrical and plumbing conduits. In other words, the Landlord needed the Tenant to have purchased and supplied the various fixtures – sinks, wet bars, lighting fixtures, etc. before it could complete the Landlord's Work and close out the Permit.
- [64] Aware of those known *uncertainties*, the Tenant did not ask that the commencement date of the Lease or the Fixturing Period be contingent on the completion of the Landlord Improvements. For those and other reasons, when read in the commercial context in which the Lease was made, the Landlord could not, and would not, have agreed to a contingent date whereby it would be left up to the Tenant to determine when, if ever, to take occupancy of the Premises and/or to assume its other obligations under the Lease.
- [65] Read in the context of the third factor, I find that the parties did not intend that the Lease include or infer a fixed date for the completion of the Landlord Improvements.

**Factor #4:** *Read in a fashion that accords with sound commercial principles and good business sense.*

- [66] The interpretation proposed by Tenant is that “to the extent that the Landlord’s Work was not completed by March 1, 2020, **it was at all times up to the Tenant to decide whether such a reasonable extension should be given to Malleum**” (Defendants’ Trial Submissions, at para. 60). [Emphasis added.]
- [67] Read in a fashion that accords with sound commercial principles, and good business sense, the Tenant’s proposed interpretation of the Lease simply cannot be accepted. This interpretation of the Lease would impose all the responsibility upon the Landlord to bring the Premises to the point at which the Tenant could commence its operation, without the Landlord having any, or any sufficient, control over things that were entirely within the control of the City of Hamilton or the Tenant.
- [68] The Tenant’s interpretation would be entirely one-sided and would fly in the face of sound commercial principles and good business sense. It would lead to the commercially absurd result of the Landlord being obligated to invest significant sums to convert the existing retail space to a restaurant space, with no certainty that the Tenant, for whom these renovations were undertaken, would ever occupy the space.

**Disposition of Issue#1: What does the Lease say?**

- [69] In my view, the Lease is clear and unambiguous and provides, in part, that:
1. The wording in the Lease itself governs.
  2. The Lease term commenced on March 1, 2020, on which date the Tenant was required to take occupancy of the Premises.
  3. March 1, 2020 was the commencement date of the Fixturing Period.
  4. The Landlord was obligated to complete the work identified in Appendix A to the Lease but no date was set by which the Landlord’s Work was to be completed.
  5. The Landlord was to be permitted access to the Premises as necessary to complete repairs, alterations, improvements, or additions, without any related abatement in rent, provided that the repairs were completed as expeditiously as reasonably possible.
  6. To the extent there existed “restrictive governmental laws or regulations” (as occurred by reason of COVID-19), the time for completion of the Landlord’s obligations under the Lease was extended, without any deferral or postponement of any of the Tenant’s obligations under the Lease.

**Discussion of Issues #2 and #3: Did either party breach or repudiate the Lease?**

- [70] The plaintiffs provided detailed evidence of the steps they took to comply with its obligations under the Lease. That evidence included that the Landlord retained an architect, who worked with an engineer to prepare the drawings needed for the Permit application. I accept the plaintiffs' evidence, and, specifically, the testimony of Mr. Pearson, that the Landlord was complying with its obligations under the Lease to complete the Landlord Improvements.
- [71] On February 20, 2020, the Landlord submitted the Permit application to the City of Hamilton and thereafter responded to requests made by the City's building department. I accept the plaintiffs' concerning the Landlord's responses to the City's requests about the Permit and find that the Landlord acted reasonably in responding to those requests.
- [72] By contrast, as will be seen below, the Tenant appeared to be dragging its feet and, itself, caused a delay in the completion of the Landlord's Work, both prior to, and after, the arrival of COVID-19.
- [73] The Landlord continued to do the work on the Premises that could be completed without a Permit (SAF paras. 13, 14). By April 4, 2020, when there was a government-ordered shutdown of all non-essential work, the Landlord had done all it could without the Permit. Between April 4, 2020 and mid-May 2020, the City's building department was not issuing permits. The government lifted this COVID-19-related work stoppage on May 19, 2020, and on May 20, 2020, the Tenant delivered the Notice.
- [74] The evidence satisfies me that, at all times, the Landlord acted reasonably, and in good faith, in fulfilling its obligations under the Lease. In particular, the Landlord continued work on the Landlord Improvements until it received the Notice. Given that finding and my earlier finding that the Lease did not specify a date for the completion of the Landlord's Work, I conclude that there was no "delay" on the part of the Landlord. However, to the extent, if any, that the Landlord's Work took longer than expected to complete, it was not through any fault of the Landlord but by other factors. These included the Tenant's inaction, the Notice, and COVID-19. To the extent that COVID-19 played any role in the Landlord's compliance with its obligations, the Landlord is entitled to rely upon Cl. 40 (Force Majeure) of the Lease.

***Tenant's Delay***

- [75] At trial, Mr. Vanderkwaak asserted that the Landlord's delay in replacing the facade windows prevented him from finalizing the floor layout of the restaurant. I do not accept that evidence, which conflicts with the email Mr. Vanderkwaak sent to Mr. Pearson on February 10, 2020, confirming that the existing windows worked well for him.
- [76] Also, as noted above, the Permit and the Landlord Improvements could not be completed unless and until the Tenant's fixtures were connected to electricity and/or water. Yet, between December 2, 2019, and February 28, 2020, Mr. Vanderkwaak had ordered only four pieces of equipment for the business: a sound system, a coffee grinder, a beer dispenser

drip tray and a point-of-sale system. That evidence undermines the defendants' assertion that the Landlord is to blame for the Tenant's inability to open for business by March 1, 2020, and/or to meet its own (uncommunicated) objective to be up and running by early summer.

- [77] The Tenant's post-Covid-19 reluctance to move forward with completion of the renovations and fixturing of the Premises may be inferred from a site meeting on March 19, 2020, among Mr. Vanderkwaak, Mr. Clayton and the owner of Newfore. Mr. Clayton's evidence was the electrical contractor had completed the "rough-ins" based on the approved drawings. Mr. Vanderkwaak then indicated that those drawings might not be the final layout. When asked what changes he wished to make, Mr. Vanderkwaak responded that he did not have any real direction other than to say that this might not be the final layout. Mr. Clayton testified that the contractor needed to be provided with finalized the layout of the restaurant, to complete the electrical and plumbing rough-ins.

### *Tenant's emails following COVID-19 Lockdown*

- [78] On March 23, 2020, the date on which the Province of Ontario ordered restaurants and bars to close, Mr. Vanderkwaak emailed Mr. Pearson voicing concern around allocating "time and financial resources to this project in the immediate future." This email also communicated his desire to "hit pause on all excess expenditures and expansion plans until there can be more certainty around the future for the restaurant and bar operations."
- [79] Mr. Pearson spoke with Mr. Vanderkwaak on March 24, 2020. According to Mr. Pearson, Mr. Vanderkwaak advised that "his business model was now presented with some pretty big uncertainty" and he was wondering "whether or not there would be an option for opportunity to delay and/or even potentially cancel the" Lease. Mr. Pearson offered to communicate Mr. Vanderkwaak's concerns to the Landlord's team and see if he could offer "some flexibility".
- [80] Mr. Vanderkwaak followed the March 24 telephone call with an email to Mr. Pearson dated March 27, 2020. In this email, Mr. Vanderkwaak. advised that given the "current business restraints (full closure), safety issues, and governmental restrictions (the business we plan to operate in the space is not currently able to operate legally until after this crisis subsides), **we have a need to delay or postpone many aspects of the project.**" Mr. Vanderkwaak suggestions were to:
1. Delay all timelines and key dates until there is more clarity around the ability of a Restaurant/Bar to even open in the space, stating: "**At this point we are unable to properly play our part in advancing construction, such as ordering and obtaining key equipment and other construction supplies.**"
  2. Postpone all start dates in our contract in a corresponding manner. Once this crisis subsides and there is more clarity around when we would be allowed to start operating a restaurant/bar as planned, we could more accurately set these dates.
  3. Stay in close contact as new information becomes available.

[Emphasis added.]

- [81] The plaintiffs submit that this email is significant. I agree.
- [82] In his email Mr. Vanderkwaak admits that as of March 27, 2020, he had not ordered “key equipment”. This admission undermines the defendants’ allegations that it was the Landlord’s conduct that delayed the Tenant’s ability to complete the Premises and open its business.
- [83] Also, in his email, Mr. Vanderkwaak suggests that the commencement date of the Lease be postponed. However, not only does he *not* mention his alleged belief that the Tenant’s obligations did not start until the completion of the Landlord Improvements, he does not allege delay on the part of the Landlord at all. Instead, Mr. Vanderkwaak acknowledges that it is the Tenant, who is unable to properly play its part in advancing construction.
- [84] On March 31, 2020, Mr. Pearson responded to Mr. Vanderkwaak’s March 27, email. In it, he explained that the government had allowed construction projects to continue, and that the Landlord intended to “push forward to complete its scope of work as soon as practically possible” and that the Landlord did not “believe that simply halting the project until further notice is a viable option given the significant additional costs” that the Landlord would incur as a result.
- [85] In this email Mr. Pearson also told Mr. Vanderkwaak that the Landlord was willing to entertain a deferral of the start of the Fixturing Period until the earlier of June 1, 2020, or the completion of the Landlord’s Work. He explained that if the start date were deferred to May 1, 2020, then the Lease would commence on that date. Mr. Pearson expressed hope that the Landlord’s “scope” would be completed in May, provided that the Tenant’s actions did not delay the project, citing as an example, the need for the Tenant to choose floor tile.
- [86] As discussed below, in Mr. Vanderkwaak’s email of April 1, 2020, the Landlord’s offer was not accepted.
- [87] To accommodate Mr. Vanderkwaak’s COVID-19-related safety concerns, the Landlord offered to arrange site meetings via videoconference or to schedule site inspections at a time when no trades were present. The Landlord was at the “rough-in stage” of the work and was awaiting the Tenant’s input for such things as flooring choice and specifications/shop drawings of the appliances and kitchen cabinets.
- [88] In this action, the defendants seek to blame the Landlord for delays in obtaining the Permit and completion of the Landlord Improvements. For example, the Tenant argues that the between March 25 and May 26, 2020, the Landlord delayed completion of the Permit application because of its disagreement with the City’s building department as to whether a “grease interceptor” was required. Ultimately, the Landlord agreed to include this equipment in the Permit application.
- [89] The grease interceptor issue was explored at trial.

- [90] I accept the Landlord's evidence that its engineer failed to follow the Landlord's instructions to include a grease interceptor in the Permit application. However, I also find that the grease interceptor issue did not delay in the issuance of the Permit; the City had raised other questions.
- [91] The Tenant also submits that the fact that the Landlord did not pursue it for payment of rent or hydro, or for confirmation that insurance was in place to be evidence that the Landlord knew its work was to be completed by March 1, 2020, failing which the commencement date of the Lease would be postponed. For the reasons discussed above, I do not accept these submissions.
- [92] The Tenant's real concern about the commencement date of the Lease was revealed in Mr. Vanderkwaak's email of April 1, 2020. In this email, Mr. Vanderkwaak's response to the Landlord's proposal of March 31, 2020 was to suggest new start dates for the Lease. These would be tied to when the government allowed businesses to reopen, given that the date on which the restrictions would be lifted was then unknown.
- [93] Mr. Vanderkwaak identified that his options were either to delay the occupancy and the opening of his business until the governmental restrictions had passed and his business was allowed to operate as planned, or to begin negotiations with the Landlord on how to cancel the project and terminate the Lease as soon as possible.
- [94] The Landlord's response to Mr. Vanderkwaak's request to renegotiate the Lease was made clear in Mr. Pearson's email of May 19, 2020, in which he advised that as the Provincial restrictions had been lifted, the Landlord's contractors were planning to resume work on May 20, 2020. Mr. Pearson concludes his email by saying: "I realize you would likely prefer them to hold off for the time being but unfortunately we are contractually bound to honour our agreements with them".

***Tenant Serves the Notice***

- [95] In the Notice served on May 20, 2020, the Tenant asserted that there had been a fundamental breach of the Lease as a result of "(1) COVID-19's impact upon the intended use of the Premises; and (2) the Landlord's failure to provide occupation to Tenant during the agreed to and scheduled critical restaurant opening period".
- [96] The Notice indicated that DM's position was that (1) the Lease Agreement had been frustrated; and (2) the Term as defined in the Lease Agreement had not commenced and therefore, no rent was due and payable.
- [97] Negotiations between the parties were unsuccessful. Confronted with the Notice and uncertain when, or if, the Tenant would take possession of the Premises, the Landlord slowed its completion of the Landlord Improvements. However, by September 15, 2020, save for some finishing details – such as painting and flooring – the Landlord's Work was completed, and the Premises were virtually ready for the installation of the Tenant's fixtures.

[98] The Landlord offered to defer the Commencement of the Lease term to August 1, 2020 (backdated to reflect the commencement of the Fixturing Period). Through its counsel, the Tenant rejected the proposed deferral and advised that there was “no scenario” in which DM would take occupancy of the Premises in the coming months. It would be relying upon the Notice.

**Disposition of Issue #2: Did the Tenant Breach or Repudiate the Lease?**

[99] For the reasons set out, I conclude that the Tenant breached the Lease by failing to honour its terms, including, but not limited to, its obligation to take occupancy, pay rent, utilities, and insurance, as required by the Lease.

[100] I also find that by the Notice, the Tenant repudiated the Lease and that the Landlord accepted that repudiation on or by September 20, 2020, when it commenced proceedings against the defendants: see, *North Bay T.V. & Audio Ltd. v. Nova Electronics Ltd. et al. Nova Electronics Ltd. v. North Bay T.V. & Audio Ltd.*, 1984 CanLII 2100 (ON CA).

***Issue #3: Did the Landlord repudiate or breach the Lease or make the misrepresentations identified in the Counterclaim?***

[101] Given my findings above, there is no evidentiary support for the Tenant’s assertion in the Notice, or in its pleadings, that there had been a fundamental breach of the Lease by the Landlord.

[102] The Lease made no reference to an agreement concerning a “scheduled critical restaurant opening period”, nor did the Lease obligate the Landlord to complete the Landlord Improvements by any set date.

[103] Given my findings as to the interpretation of the Lease, I specifically reject the arguments set out in the Defendants’ Trial Submissions and find that:

- (a) the Landlord did *not* fundamentally breach the Lease by failing to deliver premises “fit for occupation” for the Tenant’s intended use (paras. 80-88). The Lease set no deadline for the completion of the Landlord Improvements and the Tenant cannot establish any breach by the Landlord, let alone a “fundamental breach”;
- (b) the defendants’ submission that the Landlord “failed to complete the Landlord’s Work” “on time” (Defendant’s Trial Submissions, at paras. 85-87) conflicts with the evidence and my determination of the Landlord’s obligations under the Lease. Furthermore, taking into account that the Lease was for a period of ten years, any alleged delay falls well short of depriving the Tenant of substantially the whole benefit of the Lease: *Spirent Communications of Ottawa Limited v. Quake Technologies (Canada) Inc.*, 2008 ONCA 92, at paras. 35-37;
- (c) for reasons already set out, I do not accept the defendants’ assertions that the Landlord breached an implied term that it would complete the renovations by March 1, 2020, (Defendant’s Trial Submissions, at paras. 89-96);

- (d) I further find that the Landlord did not repudiate the Lease and that the Notice did not operate to as an acceptance of the Landlord's breach but, rather, communicated the *Tenant's* repudiation of the Lease;
- (e) the facts as I have found them do not support the defendants' allegations of misrepresentation – innocent, negligent, or fraudulent or otherwise. Similarly, there is no evidence to support the defendants' allegations that they were induced to enter into the Lease and Indemnity Agreement through representations made by the Landlord, through Mr. Pearson, that the Landlord Improvements would be completed by March 1, 2020. For those reasons, the defendants' claims for damages on that basis and/or rescission of the Lease and Indemnity Agreement do not succeed;
- (f) although the Defendants' Trial Submissions do not pursue the assertion made in the Notice that the Lease was frustrated, in part, by reason of COVID-19, I find that the Force Majeure clause operates in favour of the Landlord: see *Niagara Falls Shopping Centre Inc. v. LAF Canada Company*, 2023 ONCA 159 (CanLII); *Braebury Development Corporation v. Gap (Canada) Inc.*, 2021 ONSC 6210 (CanLII).

***Are the defendants' claims Statute-barred?***

[104] The plaintiffs submit that the defendants' Counterclaim is barred by the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, s. 4, s 5(1), s 5 (2) in that it was not brought until April 2023, more than two years after the Notice, which, by itself, establishes that the claims raised in the Counterclaim were discovered and/or discoverable by May 19, 2020.

[105] Despite that my findings above may render moot a determination of this issue, I do find that the evidence supports the plaintiffs' submissions that the claims in the Counterclaim are barred by the *Limitations Act, 2002*.

**Disposition of Issues #3 and #4:**

[106] For the reasons given, I find that the Landlord did not breach or repudiate the Lease, nor did it make the misrepresentations identified in the Counterclaim, or at all.

[107] In addition, I find that the defendants' Counterclaim is barred by operation of the *Limitations Act, 2002*.

[108] For these reasons, the defendants' Counterclaim is dismissed in its entirety.

**Issue #5: If the Tenant breached/repudiated the Lease, what are the plaintiffs' damages?**

[109] The parties agree that if the Tenant were found to have repudiated the Lease, the Landlord was entitled to terminate the Lease and, upon clear notice to the Tenant, the Landlord would be entitled to claim prospective damages for the loss of the benefit of the Lease bargain over its unexpired term: *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd.*, 1971

CanLII 123 (SCC) (“*Highway Properties*”); *Weins Canada Inc. v. Ensil Corporation*, 2019 ONSC 5406 (CanLII), at para. 37.

[110] I have found that the Landlord’s Application constituted that notice.

[111] With respect to the measure of damages, I accept and adopt the defendants’ submissions, taken from paras. 128 -130 of their Trial Submissions:

[128] ...the measure of damages will be the contractual measure. That measure was summarized as follows by Perrell J: “The proper measure of damages for a terminated lease is the unpaid rent to the date of the breach (the arrears of rent) plus the present value of the loss of the future rent, which is the present value of the unpaid rent for the unexpired period of the lease less the actual rental value of the premises for that period: *Morguard Corporataion v 6753060 Canada Inc.*, 2018 ONSC 48910 (CanLII), at para 23. (“*Morguard*”)

[129] Finally, because the fourth option is a contractual remedy, the principle of mitigation will apply: *Morguard*, at para. 25.

[130] With respect to the present case the Plaintiffs are seeking the fourth of the *Highway Properties* options. It follows that the prospective damages will be assessed as the present value of the unpaid rent for the unexpired term of the lease, minus the present value of any mitigating income.

[112] The plaintiffs also rely on *Morguard* for the law concerning the damages to which the Landlord may be entitled, followed in *The Canada Life Assurance Company et al. v. Aphria Inc.*, 2023 ONSC 6912 (CanLII), at para. 79; aff’d 2024 ONCA 882. *Aphria*, at para. 79, reads: “damages would include the present value of any loss of rent which could not be avoided by reasonable efforts by the landlord and the costs of such mitigation efforts.”

[113] I also accept and adopt the plaintiffs’ submissions concerning damages at paras. 128-130 of their Trial Submissions, which rely extensively on *Highway Properties* and *Morguard* and largely echo the defendants’ submissions:

[128]... The calculation of loss of future rent is the difference in the income streams from the original lease and the new lease, if any; plus reasonably foreseeable consequential losses.

[129] More generally, on a tenant’s breach of lease, as with any contract, a landlord is entitled to be compensated for its loss of bargain – which means it is entitled to be put in the same position it would have been in if the tenant had not breached the lease. A landlord is also entitled to the costs of its mitigation efforts.

[130] The components of the Landlord's damages other than the loss of rent and subsequent diminution in market value are simple to deal with:

- a. **Cost of Landlord Improvements:** This work was done for the Tenant specifically. Ironically, the Premises ended up being leased to a retail tenant, who could have taken over the Premises – which were already configured for a retail space – as- is. Most of the Landlord Improvements had to be torn out. Others, such as the large water heater, upgraded HVAC, or main-floor washrooms, were not torn out; but were superfluous to the needs of a retail tenant and confer no real value. The Landlord is entitled to recoup the costs of the Landlord Improvements.
- b. **Cost to Secure Mitigating Lease:** This cost consists of the realtor's commission for sourcing the Mitigating Lease, as well as the inducements paid to the New Tenant in the form of an improvement allowance. As these costs allowed the Landlord to secure a new tenant in the Premises, thus mitigating the otherwise substantial loss of rent, these expenses are recoverable.

[114] It must be recalled that in this case, the Property was sold. As a result, the plaintiffs seek i) lost rental income up to the date of the sale; and ii) the alleged diminution of the market value of the Property attributable to the difference between the rent payable under the Lease rent and the lower rental income payable under the Mitigating Lease.

[115] A breakdown of the plaintiffs' damages is set out in The Notice of Amounts and Particulars of Damages dated June 14, 2024, found at tab 5 of the Fresh as Amended Trial Record.

### **The Expert Evidence**

[116] The plaintiffs ask for damages under two general headings: 1. Lost rental income; and 2. Diminution in the market value of the Property as a result of the lower rent payable under the Mitigating Lease. Each side called an accounting expert to quantify lost rents to March 29, 2024, the intended closing date of the sale of the Property<sup>1</sup>. Each also called an appraisal expert to give evidence as to the diminution in the market value of the Property.

#### **1. Damages for Lost Rent**

##### (a) The Plaintiffs' Accounting Expert: Lost Rents

[117] The plaintiffs called Corey Miles, CA, CPA, CBV. He was qualified as an expert in the field of accounting and business valuation and to give opinion evidence with respect to the quantification of loss of income from the claimed breach of the Lease.

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<sup>1</sup> The closing date was amended to March 29, 2024 and later extended to April 4, 2024.

[118] Mr. Miles opined the plaintiffs' (net) lost rental revenue from the date of the alleged breach/repudiation of the Lease, to March 30, 2024, the date on which the Property was sold, was \$124,574.

[119] In arriving at his opinion, Mr. Miles relied on the following assumptions:

- (1) the Lease commenced on March 1, 2020;
- (2) no rent was payable in first six weeks;
- (3) the Tenant was responsible for utilities, estimated at \$100 per month from the commencement of the Lease to the commencement date of the Mitigating Lease; and
- (4) lost rent was calculated to March 28, 2024.

[120] In cross-examination, Mr. Miles agreed that a credit should be given for the last month's rent paid by the Tenant and that his estimate of \$100/month in utilities could have been overestimated, considering that the actual amount invoiced charged by Alectra in its invoice of April 16, 2020, was \$84.36.

(b) The Defendants' Accounting Expert: Lost Rent

[121] The defendants called Michael Iantomasi, B. Comm., CA, CPA, CBV. Mr. Iantomasi was qualified as expert in the field of accounting, business valuation, and damages quantification and to give opinion evidence with respect to the quantification of the loss suffered by the plaintiffs as a result of the alleged breach of the Lease by the defendants.

[122] In arriving at his opinion, Mr. Iantomasi relied on the following assumptions:

- (1) the Lease commenced on September 1, 2020;
- (2) no rent was payable in first six weeks;
- (3) the Tenant was entitled to a credit of \$6,244 for its pre-payment of last month's rent;
- (4) the Tenant was responsible for utilities, estimated at \$84.00 per month from the commencement date of the Lease to the commencement date of the Mitigating Lease;
- (5) the Landlord's cost associated with the Mitigating Lease totaled \$43,767.

*[Note: This amount differs from the amount set out in the plaintiff's Notice of Amounts and Particulars of Damages, Tab 5 of the Fresh As Amended Trial Record, which quantifies the cost to obtain the Mitigating Lease at \$44,716.65.];*

- (6) lost rent is calculated to March 29, 2024;

- (7) late fees were payable under Cl. 12 of the Lease of \$100.00 per month until July 2021 (the commencement of the Mitigating Lease);
- (8) the amounts paid by the Landlord for the Landlord Improvements in respect of the Lease are unrecoverable and should not be included in the calculation of the plaintiff's loss; and
- (9) unpaid rent bears interest at the rate of 1.5% per month or 18% per annum as per the terms of the Lease.

[123] I note that in his calculations of the plaintiffs' losses to the date of sale of the Property, Mr. Iantomasi included two heads of loss not included in Mr. Miles' calculations: the plaintiffs' mitigation costs of \$43,767, and interest on unpaid rent of \$36, 225.

**Disposition: Quantification of Lost Rent**

[124] In keeping with my finding that the Lease commenced on March 1, 2020, find that lost rent is to be calculated from March 1, 2020.

[125] In cross-examination, Mr. Iantomasi agreed that if it were determined that the Lease commenced on March 1, 2020, then Mr. Miles' calculation of the lost rental income would be correct. On that basis, I accept Mr. Miles' calculation of lost rent payable to the Landlord, subject to the following adjustments:

- (i) the Tenant is to be credited for the pre-payment of last month's rent; and
- (ii) the amount allocated to monthly (estimated) utilities (March 1, 2020 to July 31, 2021) is to be reduced from \$100 per month to \$85.00 per month, which is more consistent with the trial evidence;

[126] I also find that the plaintiffs are entitled to payment and/or reimbursement of the following:

- (1) interest on unpaid rent at the rate of 1.5% per month (18% per annum) calculated in accordance with Cl. 12 of the Lease;
- (2) late fees, payable under Cl. 12 of the Lease of \$100.00 per month from March 1, 2020 to July 2021 (the commencement of the Mitigating Lease);
- (3) costs incurred to obtain the Mitigating Lease in the amount of \$44,716.65 (incl. of HST), as per the plaintiffs' Notice of Amounts and Particulars of Damages; and
- (4) except where the Lease provides otherwise, prejudgment interest on the above amounts at the *Courts of Justice Act*, R.S.O.1990, c. C.43 ("CJA") prejudgment interest rate.

[127] I do not allow the plaintiffs' claim for \$85,855.24 (incl. of HST) paid by the Landlord for the Landlord Improvements. In my view, it is this very investment that entitled the Landlord to charge the Tenant rent on which the Landlord's damages are based. I accept

and adopt the defendants' submission that the plaintiffs are not entitled to receive the benefits of the Lease but avoid the costs incurred to obtain those benefits.

[128] I expect the parties to be able to reach an agreement as to the amount of the judgment under this heading of damage. However, if they cannot, they may make written submissions as directed at the end of these reasons.

**2. Damages for Diminution of Property Value for Lost Rent**

(a) Plaintiffs' expert

[129] The plaintiff called Matthew van Huizen, BA, AACI, P. App, to provide his opinion as to whether there was a loss in the sale value of the Property because it was marketed with the Mitigating Lease as opposed to the Lease and, if so, what was the diminution of value.

[130] On consent, Mr. van Huizen was qualified as expert in property appraisals to give opinion evidence with respect to the market value and diminution in the market value of the Property.

[131] Mr. van Huizen completed market value opinions under two scenarios. In arriving at his opinions, Mr. van Huizen used the Income Approach.

[132] Stately simply, the Income Approach uses the net operating income of the entire Property divided by the capitalization rate the ("Cap Rate"). Mr. van Huizen opined that:

(a) using the lease arrangements in place at the time of the sale of the Property ("Scenario I") the "retrospective market value estimate" of the Property would have been \$2,880,000;

(b) assuming that the Lease was still in place and the Tenant had completed its leasehold improvements as proposed under the Lease ("Scenario II"), the market value on November 24, 2023 would have been \$3,170,000.<sup>2</sup>

[133] The plaintiffs submit that their damages under this heading are \$290,000.00. This amount is arrived at by comparing the estimated market values of the Property under Scenario I and Scenario II, which shows a diminution in the market value of the Property of \$290,000.00 (\$3,170,000 - \$2,880,000).

[134] Mr. van Huizen was asked to explain why his retrospective valuation (\$2,880,000) under Scenario I should be accepted, when the *actual* sale price of the Property was \$2,950,000. That question was germane. If the *actual* sale price of the Property were used, the gap between the two scenarios would be smaller, thereby reducing the plaintiffs' loss.

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<sup>2</sup> In fact, the Agreement of the Purchase and Sale for the Property, was dated November 23, 2023.

- [135] Mr. van Huizen stood by his appraised values. He testified that it appeared that the actual buyer had been prepared to pay an amount in excess of market value. He stated that it would also be fair to assume that, had the Lease been in place when the Property was sold, the actual buyer would also have been prepared to pay over market value. On that basis, the gap between his two scenarios would be unchanged.
- [136] Mr. van Huizen's methodology differs from that used by the defendants' expert, Mr. Antonides, in two main respects:
- 1) The Cap Rates used by Mr. Antonides were different; and,
  - 2) Mr. Antonides used both the Income Approach and the Direct Comparison Approach to arrive at a market value.
- [137] In cross-examination, Mr. van Huizen was asked why he did not use the Direct Comparison approach as well as the Income Approach to determine market value. Mr. van Huizen explained that he did not use the Direct Comparison Approach because, in his view, a purchaser of an investment property is concerned with cash flow.
- [138] Mr. van Huizen's credibility on that point was shaken in cross-examination.
- [139] In cross-examination, Mr. van Huizen was asked about two earlier appraisals of the Property he had prepared for Malleum Core Partners I LP. In both, he had used the Income **and** the Direct Comparison Approaches.
- [140] The first appraisal was dated May 28, 2019. In that appraisal, he used both the Income Approach and the Direct Comparison Approach to arrive at an estimated market value. Using the Income Approach and a Cap Rate of 5.75%, Mr. van Huizen arrived at an estimated market value of \$1,700,000. Using the Direct Comparison Approach, Mr. van Huizen arrived at an estimated market value of \$1,690,00. His opinion that the market value was \$1,700,000 was arrived at using the two approaches.
- [141] Mr. van Huizen defined the Direct Comparison as involving "a process of comparing the subject property in all respects similar to similar properties. Sales of comparable properties are gathered, analyzed and adjusted to reflect value to the subject."
- [142] The second appraisal was addressed to the Owner and dated January 10, 2022. In this appraisal, Mr. van Huizen opined that the Property had an estimated market value of \$2,870,000. Again, for this opinion, Mr. van Huizen used **both** the Income Approach, this time using a Cap Rate of 5%, and the Direct Comparison Approach. Using the former approach, the estimated value was \$2,930,000. Using the latter approach, the market value was \$2,710,000. His final opinion of market value was \$2,870,000, essentially the midpoint between the values arrived at using the two different approaches.
- [143] In cross-examination, Mr. van Huizen agreed that using both valuation approaches was the best valuation methodology for determining market value estimate for the purposes of *those* reports.

(b) Defendants' Expert

[144] The defendant called Kevin Antonides, B.E.S., AACI, R/W-AC. He was qualified as an expert in the field of property appraisal and to give opinion evidence with respect to the estimated market value and the diminution in in the estimated market value of the Property. Mr. Antonides' provided his retrospective opinion of the Property as of November 23, 2023.

[145] Mr. Antonides' opinion was arrived at by using both the Income Approach and the Direct Comparison Approach. He also compared the same two scenarios: Scenario I - using the current lease, and Scenario II, assuming that the Lease was still in place.

***Scenario I:***

- (a) Using the Income Approach and a Cap Rate of 5%, Mr. Antonides estimated the market value of the Property at \$2,925,000;
- (b) Using the Direct Comparison Approach, he estimated the market value of the Property at \$2,960,000; and
- (c) Combining the two approaches, he opined that the Property had an estimated market value of \$2,950,000

***Scenario II:***

- (a) Using the Income Approach and a Cap Rate of 5.25%, Mr. Antonides estimated the market value of the Property at \$3,060,000;
- (b) Using the Direct Comparison Approach, he estimated the market value of the Property at \$3,100,000; and
- (c) Combining the two approaches, he opined that the Property had an estimated market value of \$3,080,000.

[146] Mr. Antonides justified his use of a higher Cap Rate under Scenario II on the basis that the Tenant was paying above market rent and, therefore, there was a higher risk to an investor because it would be harder to find a replacement tenant at the same rent.

[147] Using Mr. Antonides' values, the plaintiffs' loss attributable to a diminution in market value would be \$130,000.00 (\$3,080,000 - \$2,950,000).

**Analysis**

*Approaches to valuation*

**Scenario I Valuation**

- [148] Both appraisal experts testified that they have used the Income Approach and the Direct Comparison Approach to estimate market value of a commercial property. Mr. Antonides did so for his appraisals in this litigation. Mr. van Huizen did so when he provided market value appraisals of the Property in 2019 and in 2022.
- [149] However, in his appraisal for this litigation, Mr. van Huizen chose to use only the Income Approach to valuation. I note that, using only the Income Approach, Mr. van Huizen's opinion as to the estimated fair market value of the Property under Scenario I, was \$2,880,000 - \$70,000 less than the price actually paid for the Property.
- [150] Mr. Antonides' evidence was that the work of an appraiser is more than simply an arithmetical exercise and that, in his opinion, both the Income and the Direct Comparison Approaches should be used to arrive at a market value. I note that, by using both approaches in his appraisal of the Property under Scenario I, Mr. Antonides' opinion as to the estimated fair market value matched the actual sale price of the Property.
- [151] Given that he used both approaches in his two earlier appraisals of the Property, I find it difficult to accept Mr. van Huizen's testimony that it was not appropriate to do so again, when he appraised the Property for this litigation.
- [152] I have considered the evidence of both experts and prefer Mr. Antonides' evidence that both approaches should be used here.
- [153] I note also, that when each appraiser used both approaches - Mr. van Huizen in his 2019 and 2022 valuations and Mr. Antonides in his two valuations in this case - their opinions as to value fell approximately mid-way between the values achieved using the two different approaches.
- [154] As Mr. van Huizen did not undertake a Direct Comparison Approach, there was no competing evidence as to whether the comparable properties chosen by Mr. Antonides were appropriate.
- [155] Mr. Antonides was cross-examined on his choice of comparable properties, most of which included a ground floor restaurant or cafés and not a clothing store. Mr. Antonides explained that in determining whether a property was comparable, he looked at its potential use as a restaurant – the Tenant's intended use – and that the Landlord had undertaken renovations to make the Premises suitable for that use.
- [156] For all of these reasons, I prefer Mr. Antonides' opinion as to the Scenario I market value of the Property, which I find to be **\$2,950,000**.

### **Scenario II Valuation**

- [157] As noted, Mr. van Huizen used only the Income Approach to arrive at a Scenario II estimated market value of \$3,170,000. I accept that this calculation is appropriate, however I cannot accept his overall opinion, which fails to include a valuation using the Direct Comparison Approach.

- [158] Nor do I fully accept Mr. Antonides' Scenario II estimated value using the Income Approach.
- [159] The plaintiffs had challenged Mr. Antonides' Scenario II valuation using the Income Approach because he increased the Cap Rate of 5%, used under his Scenario I valuation, to a Cap Rate of 5.25%, used for his Scenario II valuation. This change resulted in a lower overall valuation.
- [160] Mr. Antonides was cross-examined on his use of two different Cap Rates and explained that he used a higher rate under Scenario II because the Tenant was paying above market rent and, therefore, if the Tenant left, it would be difficult to find a replacement tenant that would pay the same rent.
- [161] I am not persuaded that the evidence at trial supports the assumption made by Mr. Antonides. While Mr. Vanderkwaak testified that he was willing to pay \$500.00 more per month than the Landlord had been asking, he did so in return for the Landlord's agreement to undertake the Landlord's Work. The evidence is that the Landlord spent approximately \$85,855 on new bathrooms, new wiring, new A/C, etc., which, in the eyes of the Tenant, justified paying \$500 more per month than the Landlord was asking for the *unrenovated* Premises.
- [162] In appraisals in which both experts had used a combination of the Income Approach and the Direct Comparison Approach, they used the approximate midpoint between the values achieved by each approach, to arrive at an overall estimated value. On that basis, I conclude that the appropriate Scenario II estimated value is \$3,135,000: the midpoint between Mr. van Huizen's Income Approach value of \$3,170,000 and Mr. Antonides' Direct Comparison Approach value of \$3,100,000.

**Disposition: Quantification of Diminution of Property Value**

- [163] For the reasons above, I quantify the plaintiffs' damages attributable to a diminution in the value of the Property by reason of the Tenant's breach or repudiation of the Lease to be: \$185,000 (\$3,135,000 - \$2,950,000).

**Conclusion and Orders**

- [164] The plaintiffs are entitled to judgment against the Tenant under the Lease, and against Mr. Vanderkwaak, jointly, under the Indemnity Agreement, as follows:
1. Damages for lost rent in accordance with paragraphs 125 to 127 of these reasons.
  2. Damages for diminution in value of the Property in the amount of \$185,000.
  3. Also, as noted above, unless stated otherwise in these reasons, prejudgment and post judgment interest on damages is payable in accordance with the *CJA*. The parties are expected to reach an agreement on the calculation of interest. In the event they are unable to do so, they may make written submissions on this issue within **14 days** of the

release of this decision. The written submissions are to not to exceed 3 pages and may be submitted to me by sending them via email to through the Civil Trial Coordinator.

4. The defendants' counterclaim is dismissed.

**Costs**

- [165] As the successful parties, the plaintiffs are presumptively entitled to their costs.
- [166] The parties are encouraged to resolve the issue of costs. If they are not able to do so, each may provide written costs submissions, not to exceed three pages in length, and shall also submit Bills of Costs and, if applicable, copies of any relevant Offers to Settle.
- [167] Written submissions are to be submitted via email to my attention, through the Civil Trial Co-ordinator.
- [168] The plaintiffs' costs submissions are to be served and filed within **21 days** of the release of these reasons.
- [169] The defendants' responding submissions are to be served and filed within **7 days** following the delivery of the plaintiffs' costs submissions.
- [170] If no costs submissions are received within **28 days** of the date of the release of these reasons, costs will be deemed to be settled and I will make no further order.

**Released:** July 4, 2025

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Justice L. Sheard

**CITATION:** *Malleum Real Estate Mgt. Corp. et al. v. Donut Monster Inc. et al.*, 2025 ONSC 3997  
**COURT FILE NO.:** CV-20-73963  
**DATE:** 2025/07/04

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

MALLEUM REAL ESTATE MANAGEMENT CORP.  
and MALLEUM REAL ESTATE PARTNERS V LP

Plaintiffs/Defendants to Counterclaim

**– and –**

DONUT MONSTER INC. and REUBEN  
VANDERKWAAK

Defendants/Plaintiffs by Counterclaim

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**REASONS FOR JUDGMENT**

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Justice L. Sheard

**Released:** July 4, 2025