IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kebet Holdings Ltd. v. First Industries Corporation,* 2025 BCSC 1986

Date: 20251009
Docket: S237907
Registry: Vancouver

Between:

Kebet Holdings Ltd.

Plaintiff

And:

First Industries Corporation

Defendant

And:

Kebet Holdings Ltd.

Defendant by Counterclaim

Before: The Honourable Justice Marzari

Reasons for Judgment

Counsel for the Plaintiff and Defendant by Counterclaim:	S. Griffin C. Bildfell
Counsel for the Defendant:	D. Curcio Lister C. Dayan J. Wallbridge
Place and Dates of Hearing:	Vancouver, B.C. June 23 – 25, 2025
Place and Date of Judgment:	Vancouver, B.C. October 9, 2025

Table of Contents

INTRODUCTION

[1] On October 17, 2023, the defendant First Industries Corporation (the "Tenant") gave notice to its landlord, the plaintiff, Kebet Holdings Ltd. (the "Landlord") of a pending share purchase of all the Tenant's shares, which was then set to close at the end of October 2023. Notice and approval of changes of control over the Tenant is required pursuant to the lease between the Tenant and the Landlord dated October 17, 2008 (the "Lease"). The Landlord took the position that the Tenant's notice of the change of control of its shares was late and gave rise to an independent right to terminate the Lease pursuant to a termination clause in the Lease. It did not approve the change of control sought by the Tenant.

Nevertheless, the Tenant proceeded with the share sale on November 2, 2023, alleging the Landlord's withholding of its consent was in bad faith.

[2] The primary issue in this summary trial is the applicability and enforceability of the termination clause in the Lease, relied upon by the Landlord, that allows the Landlord to terminate the Lease upon notice by the Tenant of an intended "assignment or subletting" of the Lease by the Tenant (the "Termination Clause"). There is some legal controversy about the validity of such clauses, particularly where the lease also contains a provision that prevents a landlord from unreasonably refusing to approve a requested sublet or assignment (which this Lease does). However, before me, the primary issue is whether the reference to "assignment or subletting" in the Termination Clause in the Lease applies to the Tenant's share purchase in 2023 at all.

[3] Relying on this Termination Clause, as well as the fact that the Tenant provided less than the 90 days' notice of the change in control of the Tenant as required under the Lease and proceeded without its consent, the Landlord terminated the Lease on November 14, 2023. The Landlord filed this action just over a week later on November 22, 2023, after the Tenant refused to immediately vacate the leased premises. The Tenant brought a counterclaim seeking injunctive relief preventing their eviction, declarations regarding the invalidity of the Landlord's notice of termination, punitive damages for the Landlord's breach of the Lease, and relief from forfeiture in the alternative.

[4] The claims came before me by way of summary trial brought by the Landlord for the declaratory and injunctive relief it seeks and a dismissal of the Tenant's counterclaim. At the outset of the summary trial, the Tenant sought an adjournment on the basis that the Landlord's summary trial application was premature in light of several outstanding disclosure applications, pertinent primarily to the Tenant's claims for bad faith and relief from forfeiture. I declined that adjournment on the basis that it was possible that the interpretation of the Termination Clause would be determinative of much, if not all, of the claims.

[5] As it turns out, I find that the interpretation and applicability of the Termination Clause can be determined summarily, that I am able to resolve most of the issues before me on the plaintiff's summary trial application on the evidence before me, and that it is just and appropriate for me to do in these circumstances.

[6] I find that the Termination Clause, properly construed, relates only to a sublet or assignment of the Lease, and therefore does not apply to the Tenant's share purchase. It is therefore not necessary for me to determine whether the Termination Clause is fundamentally incompatible with the other Lease provisions that provide that the Landlord may not unreasonably refuse a requested sublet or assignment of the Lease.

[7] The evidence is also sufficient to establish that the Tenant's late notice of its proposed share purchase was a breach, but not a fundamental breach, of the Lease, and did not constitute a repudiation by the Tenant of the Lease. The Landlord was therefore not legally entitled to terminate the Lease on that basis. Nor did the subsequent or prior conduct of the Tenant relied upon by the Landlord provide such grounds, alone or in combination with other breaches. The plaintiff had the onus to prove fundamental breach of the Lease on this summary trial, and I find that it failed to do so on the evidence.

BACKGROUND FACTS

[8] Aside from the alleged bad faith purposes of the Landlord in terminating the Lease, many of the background facts in this summary trial are not in dispute. The background information regarding the Tenant was set out in the second affidavit of Kevin Kotyk (who has been with the First Truck Group since 2008) and that of the Landlord in the first affidavit of Mr. Yuen (who has been with the Landlord's parent company, the Beedie Group, since 2008). Despite the fact that both of these affidavits contain statements that would best be described as conclusory or opinion evidence, sometimes crossing into argument, I find that I can disregard the inadmissible aspects of these affidavits and rely only on those parts of these affidavits that state factual information about which the affiants have direct knowledge given their senior role in their respective corporate groups in order to make the following factual findings in this summary trial.

The Premises

[9] The Lease relates to 11 acres of land and structures located at 18688 96 Avenue, Surrey, British Columbia (the "Premises"). Daimler Trucks Canada Ltd. ("Daimler") originally purchased these lands and custom built a 60,000 square foot facility on the Premises for the specific purpose of housing a Daimler-authorized dealership for the sale, service and repair of Daimler trucks (the "Surrey

Dealership”). Since then, the Surrey Dealership has sold, serviced and repaired Daimler vehicles from the Premises, including the Freightliner brand of tractor-trailers, Thomas Built Buses, and various emergency vehicle brands.

[10] Pursuant to the Lease, the only permitted use of the Premises is the sale, leasing, and servicing of vehicles in connection with an authorized Daimler Trucks dealership. I find that the known context at the time of the formation of the Lease, and the terms of the Lease, establish that this restriction on the use of the Premises was central to the agreement between the parties with respect to the Lease and the transfer provisions within the Lease.

[11] Prior to 2008, Freightliner Ltd. was the registered legal owner of the Premises, which it held for the benefit of Daimler. In 2008, First Truck Centre Vancouver Inc. (“FTCV”), a predecessor corporate entity of the current Tenant, acquired the Surrey Dealership from Freightliner. At that time, FTCV entered into the long-term Lease over the Premises. The Lease has no financial reporting conditions, and FTCV was not required to provide Daimler with a security deposit or any personal guarantees as a term of the Lease.

[12] The Lease was originally between Daimler as the landlord, Freightliner as the nominee, and FTCV as the tenant, for the lease of the Premises, including both the lands and the dealership building and service and repair facility. The Lease has a fixed initial 20-year term, commencing October 17, 2008, and expiring October 17, 2028. At the Tenant’s option, the Lease is renewable for two additional five-year terms with rent to be determined in accordance with the Lease provisions. The base rent is pre-set for the full first 20-year term.

[13] In January 2023, FTCV amalgamated with its parent corporation, the named defendant First Industries Corporation, together with 13 related dealerships and nine wholly owned subsidiary operating companies. Collectively these dealerships are known as the First Truck Group, and they make up the largest Daimler Truck dealership group in Western Canada. The evidence establishes that as a result of this amalgamation, which was done pursuant to the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BC BCA*] there were no operational or managerial changes to the Surrey Dealership. I am also satisfied that the Surrey Dealership’s use of the Premises has remained substantially unchanged since 2008, although new Daimler brands have been introduced during this period,

including an electric vehicle brand called RIZON that required an electric charging station be added to the Premises in early 2023.

[14] At the time of the summary trial, the Tenant had been carrying on business from the Premises for almost 17 years, and the initial term of the Lease still had three years and four months remaining, with the potential of a further 10-year renewal of the tenancy. It is uncontested that the rent due under the Lease has always been paid on time by the Tenant. There is no record of any complaints or breaches of the Lease by the Tenant prior to the allegations raised in this litigation, and indeed the current Landlord, who is no longer Daimler but rather a property investment and management firm, had little interaction with the Tenant since having the Lease assigned to it in 2020.

[15] Since the Lease's execution in 2008, there have been multiple changes to the landlord under the Lease. Daimler sold the Premises to a third party, and on December 18, 2019, that third party sold the Premises to the Beedie Group, which is a real estate development investment and management group based in Burnaby, BC. The Beedie Group internally assigned the Lease to the plaintiff in February 2020, at which point the plaintiff assumed all rights, title, and interest in the Lease and becoming the current Landlord under the Lease.

[16] Prior to assuming the Landlord's rights under the Lease, the evidence establishes that it had no information pertaining to the Tenant's corporate structure or financial circumstances. According to the Landlord's representative, Mr. Yuen, the only information the Landlord had regarding the Tenant when it took the assignment of the Lease was that the Tenant was in the business of selling trucks and was a tenant in good standing.

The Lease

[17] The provisions of the Lease at the heart of this dispute, and upon which the Landlord relies to terminate the Lease, are contained in s. 9, which provides in relevant part:

> **9. Assignment and Subletting.**
>
> (a) **Transfers**. Tenant shall not, without the prior written consent of the Landlord: (1) assign, transfer, or encumber this Lease or any estate or interest herein, whether directly or by operation of law; (2) permit any other entity to become Tenant hereunder by merger, consolidation, or other

reorganization; (3) if Tenant is an entity other than a corporation whose stock is publicly traded, permit the transfer of an ownership interest in Tenant so as to result in a change in the current control of Tenant; (4) sublet any portion of the Premises; (5) grant any license, concession, or other right of occupancy of any portion of the Premises; or (6) permit the use of the Premises by any parties other than Tenant (any of the events listed in Section 9(a)(1) through Section 9(a)(6) being a "**Transfer"**).

(b) **Consent Standards**. Landlord shall not unreasonably withhold, delay or condition its consent to any assignment or subletting of the Premises, provided that the proposed transferee: (1) is creditworthy; (2) has a good reputation in the business community; (3) is an approved and authorized Daimler Trucks dealer and will use the Premises for the Permitted Use in strict accordance with all terms and provisions of this Lease; (4) will not use the Premises, or Project in a manner that would materially increase the pedestrian or vehicular traffic to the Premises or Project; and (5) is not a governmental entity, or subdivision or agency thereof; otherwise, Landlord may withhold its consent in its sole discretion.

(c) **Request for Consent**. If Tenant requests Landlord's consent to a Transfer, then, at least ninety (90) days prior to the effective date of the proposed Transfer, Tenant shall provide Landlord with a written description of all terms and conditions of the proposed Transfer, copies of the proposed pertinent documentation, and the following information about the proposed transferee: name and address; reasonably satisfactory information about its business and business history; its proposed use of the Premises; banking, financial (including audited financial statements if available or, if not available, unaudited financial statements certified as accurate by an independent certified public accountant), and other credit information; and general references sufficient to enable Landlord to determine the proposed transferee's creditworthiness and character. Concurrently with Tenant's notice of any request for consent to a Transfer, Tenant shall pay to Landlord a fee of $1,000 to defray Landlord's expenses in reviewing such request, and Tenant shall also reimburse Landlord immediately upon request for its reasonable attorneys' fees incurred in connection with considering any request for consent to a Transfer.

(d) **Conditions**. If Landlord consents to a proposed Transfer, then the proposed transferee shall deliver to Landlord a written agreement whereby it expressly assumes Tenant's obligations hereunder. No Transfer shall release Tenant from its obligations under this Lease, but rather Tenant and its transferee shall be jointly and severally liable therefor. Landlord's consent to any Transfer shall not be deemed consent to any subsequent Transfers. If an Event of Default occurs while the Premises or any part thereof are subject to a Transfer, then Landlord, in addition to its other remedies, may collect directly from such transferee all rents becoming due to Tenant and apply such rents against Rent. Tenant authorizes its transferees to make payments of rent directly to Landlord upon receipt of notice from Landlord to do so following the occurrence of an Event of Default hereunder. Tenant shall pay for all costs and expenses arising from or related to a Transfer, including without limitation, the cost of any demising walls or other improvements necessitated by a proposed subletting or assignment.

…

> (f) **Cancellation**. Landlord at its option may, within thirty (30) days after submission of Tenant's written request for Landlord's consent to an assignment or subletting, terminate this Lease as of the date the proposed Transfer is to be effective. Landlord may exercise such option to terminate by giving notice thereof to Tenant within such 30-day period. If Landlord exercises such option to terminate, Tenant shall be released from all obligations arising under this Lease for the period on and after the effective date of termination, except for those obligations hereunder that expressly survive expiration or termination of this Lease.
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> [Emphasis added.]

[18] It is the latter subsection, s. 9(f), which I have referred to as the Termination Clause, that the Landlord specifically relies upon as providing an independent basis to terminate the Lease, in addition to its arguments with respect to repudiation of the Lease stemming from the Tenant's late notice of the share purchase agreement under s. 9(c), and the Tenant's decision to proceed with this share transaction notwithstanding the lack of consent from the Landlord required by s. 9(a) of the Lease.

The Change in Control

[19] In September 2023, the Tenant entered into a share purchase agreement (the "SPA") with a numbered company, 2545908 Alberta Ltd, a wholly owned subsidiary of a large multi-national commercial truck dealership group known as the Velocity Vehicle Group (the "Purchaser"). Under the SPA, the Purchaser would acquire all of the Tenant's shares, resulting in a change in control for the Tenant's 12 commercial truck dealerships in British Columbia and Alberta, the Surrey Dealership being the largest of these.

[20] As part of the SPA's closing conditions, the Purchaser required that consent and estoppel certificates be obtained from all landlords of First Truck Group's leasehold properties, including from the Landlord with respect to the Surrey Dealership.

[21] The Tenant sought the Landlord's consent to the SPA by way of email on October 17, 2023. It concedes that it did not, however, seek the Landlord's consent more than 90 days in advance of the anticipated closing date of the SPA. It also did not immediately pay the $1,000 fee for that transfer, or provide all of the information regarding the transferee, as required by s.9(c) of the Lease. I accept the evidence of Mr. Kotyk that the Tenant did not expect that the late notice of the

transaction, or the transaction itself, would be of concern to the Landlord at that time. I also accept Mr. Kotyk's evidence, which is not controverted, that up to that point the Landlord had made no enquiries about the Tenant's corporate structure, share ownership or financial position.

[22] Instead of giving formal notice under s. 9(c) of the Lease, the Tenant's counsel emailed Chelsea Virji, the Landlord's Property Manager for the Premises, advising her that the Tenant was in the process of completing the SPA and, as part of the conditions prior to closing the SPA, they were required to obtain an estoppel certificate from the Landlord. The email enclosed a copy of the requested estoppel certificate, and the Landlord was asked to review, sign, and return it as soon as possible given the imminent closing of the SPA at the end of October.

[23] By way of an email dated October 19, 2023, Ms. Virji responded to the Tenant and said that the Finance department would require more information on the nature of the transaction, including whether the Tenant was being bought out and, if so, details on the Purchaser, the impact to the Tenant's financial position, and their general financial information.

[24] Counsel for the Tenant responded to Ms. Virji by way of email that same day advising that:

a) The Tenant's parent company was being acquired by another US-based operator of multiple Freightliner/Western Star dealerships; and

b) There were no changes to the Tenant's assets or financial position.

[25] Ms. Virji then sent an email, asking for the Tenant to "provide more information on the new parent company", and stating that "[t]he backing of the tenant with a change of parent company would be a material impact."

[26] On October 23, 2023, the Tenant's counsel advised Ms. Virji that the Tenant was being acquired by a wholly owned subsidiary of Velocity Dealership Acquisition LLC based out of Delaware. Counsel also provided, on a "confidential" basis, a detailed corporate structure and 29 pages of information, describing the corporate structure of the Velocity Truck Centres LLC and its financial statements. This included:

a) information regarding Velocity's corporate structure, organization and business, including that Velocity sells and services new and used trucks and buses, as well as full maintenance leasing and truck rental services (page 9);

b) extensive details regarding Velocity's assets and accounting policies which I find show a highly profitable organization (pages 9–16);

c) information regarding Velocity's recent acquisitions and divestitures (pages 16–17);

d) financial information (pages 17–25); and

e) consolidated balance sheets (pages 27–28).

[27] No information was provided about the Alberta numbered company that was the wholly owned affiliate of Velocity Truck Centres LLC. For the reasons set out below, I find that this had no material effect on the Landlord's decision making.

[28] Ms. Virji acknowledged receipt of this information and said that "Finance is reviewing and will let me know if they require anything further." Ms. Virji also provided a standard form Non-Disturbance Agreement from its mortgagee as requested by the Tenant. She also provided the Landlord's bank's standard form Non-Disturbance Agreement relating to the mortgage on the Premises.

[29] It is apparent from the documents disclosed by the Landlord that Ms. Virji also forwarded the corporate and financial information regarding the Velocity Group to others within the Beedie Group. There are a series of internal emails over which the Landlord claims privilege, and I am told this is because they were provided to or include the advice of in-house counsel for the Beedie Group. From the single internal email produced by the Landlord during this period, which was from the Beedie Group's Vice-President of Finance to the President, Industrial of the Beedie Group, Mr. Yuen, I conclude that the Finance department, at least, was satisfied that the corporate organization to which the Purchaser belonged had more than $1 billion in assets, over $2 billion in sales, almost $500 million in EBIDA in 2022, and $125 million in equity.

[30] The evidence establishes that the Landlord made no further requests for information about the Purchaser's ability to financially back the Tenant prior to the closing of the SPA. Furthermore, according to the Landlord, there were no other internal documents exchanged within the Landlord's organization raising any concerns or discussing the Purchaser at all (or at least none that were not related to the giving or receiving of legal advice upon which the Landlord relies). Nor does the affidavit evidence provided by the Landlord support the proposition that the financial strength (or other characteristics) of the Purchaser were an ongoing concern for the Landlord at the time it withheld its consent to the SPA or gave notice of termination of the Lease. I find they were not.

[31] Between October 27 and October 31, 2023, there is evidence of oral and written communications between representatives of the Landlord and the Tenant, including communications between in-house counsel for the Landlord, Mr. Wilson, and external counsel for the Tenant. I am concerned about the admissibility of these potentially privileged discussions. However, to the extent that the parties rely on their own statements to support their positions before me, I am satisfied that they have waived any settlement privilege over their own statements. I am not so satisfied with respect to the admissibility of hearsay statements said to have been made by the other party during these exchanges.

[32] Mr. Yuen's affidavit contains evidence of the Landlord's communication of its own position in this regard. Mr. Yuen's evidence establishes that on October 27, 2023, the Landlord's in house counsel, Mr. Wilson, spoke to counsel for the Tenant, warning the Tenant that the signing of the estoppel certificates was more complex than the Tenant may have anticipated. Specifically, Mr. Wilson advised that the Landlord was of the view that the request triggered the Landlord's right to terminate the Lease, and that the request was made late pursuant to s. 9(c) of the Lease. At that time, Mr. Wilson also suggested that the Landlord was open to a discussion about a "path forward" with the Tenant paying increased rent for the Premises.

[33] In a follow-up letter, on October 30, 2023, Mr. Wilson advised the Tenant's legal counsel as follows:

> … the Landlord is currently within the 30-day window in which it may elect to terminate the Lease pursuant to section 9(f) of the Lease. We have until November 16, 2023 to make this election. We are currently considering this internally, taking into account a number of factors including that the base

> rent being paid by the Tenant under the Lease is well below current market rent.
>
> As I alluded to on our call, our leasing team is open to having a discussion with the Tenant (or purchaser) this week about a path forward between the Tenant and Landlord, with the Tenant paying market rent for the premises being leased pursuant to the Lease.
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> [Emphasis added.]

[34] In his discovery evidence, Mr. Yuen explained that in addition to the factor of the rent being well below market, the other "factors" that the Landlord was considering in terms of whether to terminate the Lease were the current market conditions, the Premises' relettability, and redevelopment opportunities.

[35] On October 31, 2023, Mr. Yuen and Mr. Wilson had two meetings with representatives of the Tenant and its legal counsel. Mr. Yuen describes the Landlord's position at those meetings as follows in his first affidavit:

> 26. … Mr. Wilson reiterated that we had an option to terminate the Lease, but as a business courtesy, we would be prepared to have a discussion around market rents and the potential for the Tenant to remain in the building. I also suggested that perhaps it would be worthwhile for the Tenant to delay the closing of their sale, since some time would be required for the Tenant to educate itself about market rent at the time. Mr. Yurkovich asked whether we would be open to another discussion that afternoon, as they needed to confer. We said we would do so.
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> …
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> 29. …. The Landlord had advised that it had a termination right under the Lease, in addition to the fact that the Tenant had also not complied with the terms of the Lease for a request for consent. As the Landlord had specifically bargained for a termination right under the Lease, we advised we would be willing to first have a discussion about rent and the potential for the Tenant to remain in the building as an alternative to exercising the option for termination. To me, the suggestion to have that discussion after closing was inconsistent with the Landlord's contractual termination right and had it backwards.
>
> 30. As such, we noted that if the Landlord was not to exercise its termination option, the Landlord would look for the rents to be brought up to market for the remainder of the term and any extension term.
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> 31. I reiterated my recommendation that the Tenant should delay the closing.

[36] Following these discussions, the Landlord did not consent to the change in control contemplated in the SPA. Counsel for the Tenant wrote to the Landlord on November 1, 2023, stating that the SPA was nevertheless expected to close that day. That letter enclosed a $1,000 cheque for the fee required to be paid by the

Tenant pursuant to s. 9(c) of the Lease in relation to the Landlord's consideration of the SPA. It also suggests that there "is no genuine reason" why the Landlord had not provided its consent, and objecting to the Landlord's reliance on s. 9(f) of the Lease as inapplicable to anything other than an assignment or sublet of the Lease. Instead, it suggests that the Landlord was failing to act in good faith by proposing an increase in the rents as the only way forward, with the intention of terminating the Lease if the Tenant does not agree to this increase. It further alleges bad faith conduct in withholding consent in order to "manufacture an Event of Default" and to "extort … additional rent". The letter demanded the Landlord's written consent.

[37] Instead, Mr. Griffin, who was and is the Landlord's external counsel, issued a letter to the Tenant through its counsel dated November 1, 2023, objecting to the allegations of bad faith, asserting the applicability of s. 9(f) of the Lease, formally advising of the Landlord's right to rely upon s. 9(f) to terminate the Lease, and stating that any change of control of the Tenant without the Landlord's consent would constitute an "Event of Default."

[38] Counsel for the Tenant responded again that same day arguing that s. 9(f) of the Lease did not give the Landlord a right to terminate, and seeking the Landlord's consent to the SPA. The Tenant then proceeded to close the SPA either that day or the following day, without the Landlord's consent.

[39] After the SPA closed, the Tenant underwent two internal amalgamations:

a) On November 3, 2023, the Purchaser's Alberta holding corporation used to purchase the Tenant's shares amalgamated with the Tenant; and

b) On November 4, 2023, the Tenant amalgamated with its subsidiary, First Truck Centre Inc.

The Landlord's Termination of the Lease

[40] On November 8, 2023, Mr. Griffin sent a letter on behalf of the Landlord to the Tenant explaining the Landlord's position that s. 9(f) applies to all forms of Transfers defined in s. 9(a), despite the provision only referring to "assignments" and "subletting". That letter further asserted that, because the Tenant had completed the SPA without obtaining the Landlord's consent, "the Tenant has

repudiated the Lease and the Landlord is entitled to accept that repudiation." Counsel advised that the Landlord reserved all rights and remedies, including that "it is entitled to terminate the Lease, either as an acceptance of the Tenant's repudiation of the Lease … or… pursuant to Section 9(f) of the Lease."

[41] By way of letter dated November 14, 2023, Mr. Griffin wrote to the Tenant on behalf of the Landlord advising that the Landlord was terminating the Lease, on the basis of both an acceptance of the Tenant's asserted repudiation of the Lease by proceeding with the SPA without consent and without 90 days notice, and pursuant to s. 9(f) of the Lease. It demanded that the Tenant deliver up the Premises "forthwith" and to pay its legal costs.

[42] By way of letter dated November 15, 2023, the Tenant's counsel before me, Ms. Curcio Lister, wrote to the Landlord's counsel and advised that the Tenant disagreed that the Landlord had a basis to terminate "whether characterized as repudiation or otherwise." The Tenant asserted that it continued to be bound by the Lease and would continue to pay rent pending a court determination of the Tenant's entitlement to remain on the Premises.

[43] The Tenant paid its rent in full to the Landlord for November 1, 2023, and December 1, 2023. The Landlord returned to the Tenant part of the payment for November 2023 and all of the payment for December 2023. The Landlord indicated that it would not accept any rent payments going forward. The Tenant's legal counsel then deposited the returned rental amounts into its trust account.

[44] Since then, the evidence establishes that in every month starting January 1, 2024, the Tenant's counsel has written to counsel for the Landlord advising that the Tenant remains willing and able to fulfill the terms of the Lease between the parties, including the payment of monthly rents. The Tenant has continued to pay its rent to its counsel's trust account. As of June 2, 2025, the Tenant's counsel held a total of $2,371,810 in its trust account for the purposes of the Tenant's rent obligations to the Landlord.

[45] I find on the basis of counsel's representations to me that the Landlord has refused to accept these funds so as not to compromise its position that the Lease was terminated in November 2023. Nor does the Landlord seek any relief that would allow it to accept these funds on an interim or without prejudice basis.

[46] The Landlord does not seek to establish, through evidence at this summary trial, any loss or prejudice suffered by it as a result in the Tenant's change in control, or its late notice of that change. It asserts that prejudice as a matter of law or principle, but not of fact or evidence. When asked what, if any, loss or prejudice I might find that the Landlord suffered as a result of the Tenant's late notice or change of control under the SPA, counsel's response was that the Landlord lost the earlier opportunity to terminate the Lease pursuant to the Termination Clause, and thereby the ability to potentially receive higher rents for the Premises under a new lease arrangement earlier than November 2023.

[47] The Landlord provided no evidence of what it says its losses or damages might be in this regard, or what the market rates it might obtain for the Premises should it not be constrained by the stated Lease rates. Instead, the Landlord seeks a further hearing to quantify its losses as a result of the Tenant's refusal to vacate the Premises, which it says ought to be based not on the loss of the Tenant's rent payments since its notice of termination of the Lease, but on what it says would have been higher market rents for the Premises than those provided for in the Lease, which it says it will be able to prove through evidence in a further damages hearing.

[48] I am satisfied that the Landlord is not claiming, and has not established, that it suffered any loss or damage from the Tenant's breach of the notice requirements under s. 9(c), or from proceeding with the SPA without consent of the Landlord contrary to s. 9(a) of the Lease, other than the potential for an earlier opportunity to terminate the Lease under s. 9(f). There is no foundation in the evidence before me to suggest that the SPA detrimentally affected the Tenant's ability to pay rent to the Landlord, or that this continued to be a concern for the Landlord after receipt of the Purchaser's financial information.

[49] To the contrary, the Landlord's evidence, including all of its produced internal correspondence regarding the SPA, indicates that the Landlord's reason for withholding consent was its desire to obtain higher rents for the Premises by leveraging its ability to terminate the Lease under s. 9(f). In Mr. Yuen's words, the option of consenting to the SPA and then having negotiations around rent increases in lieu of termination "had it backwards." The Landlord's own evidence is that it would not consider the SPA under s. 9(a) without concessions on the rent in relation to its asserted right to terminate under s. 9(f).

ISSUES

[50] The key issues in this summary trial before me are as follows:

a) Is the plaintiff's application suitable for summary trial?

b) Does the term "assignment or subletting" in the Termination Clause include the Tenant's sale of its shares in November 2023?

c) Did the Tenant's late notice of the SPA, or proceeding with the SPA without the Landlord's consent, give rise to a fundamental breach of the Lease that entitled the Landlord to terminate (either alone or in combination with other Tenant conduct)?

d) If the Tenant did commit a fundamental breach of the Lease, should it be entitled to relief from forfeiture?

e) What remedies are the parties entitled to?

IS THIS MATTER SUITABLE FOR SUMMARY TRIAL?

[51] As noted above, I find that the plaintiff's summary trial application is amenable to summary disposition. While there are aspects of the defendant's counterclaim that are not so amenable, including the Tenant's claim for punitive damages based on allegations of bad faith dealings by the Landlord, I find that these aspects of the claims are severable, as is the plaintiff's damages claim.

[52] As argued by the Landlord in its response to the Tenant's application to adjourn the summary trial, I find that the interpretation of the Termination Clause is primarily a legal question for which I do not require any evidence beyond that which was presented before me. Indeed, the subjective views and opinions of the parties provided in the affidavits of both Mr. Yuen and Mr. Kotyk are irrelevant to that interpretive exercise: *Hardy v. Graham,* 2024 BCCA 67 at para. 23. I agree with the Landlord that this primarily interpretive exercise is amenable to summary trial and disposes of a significant issue between the parties.

[53] In addition, the principal facts related to the Tenant's breaches of the notice and consent requirements under the Lease are largely conceded. While Mr. Kotyk provides evidence about the Tenant's good faith intentions in that regard, the

admissibility of which is challenged by the plaintiff, little turns on the subjective statement of these motivations for my purposes. The evidence establishes that the Tenant chose to proceed with the SPA notwithstanding the Landlord expressly not providing its consent, and that its actions were deliberate in this respect. The reasons for the Tenant doing so are contemporaneously set out in the admissible correspondence. I find I can address the Landlord's claims with respect to whether such conduct amounts to a repudiation of the Lease by the Tenant, alone or in combination with other corporate changes relied upon by the Landlord, on an objective basis, as is required: *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at paras. 139, 179, Cromwell J. concurring; *Terrien Bros. Construction Ltd. et al. v. Delaurier et al.*, 2006 BCSC 1645, at paras. 49–51, aff'd 2007 BCCA 623 [*Terrien Bros.*].

[54] Whether the Landlord unreasonably withheld its consent to the SPA is more controversial. The Landlord's good faith in withholding its consent to the SPA is a matter that the Tenant strenuously argues should only be heard after the Tenant's applications for further discovery and disclosure of the Landlord's internal correspondence, which requires a judicial consideration of the Landlord's claims of solicitor-client privilege over its internal correspondence. However, I find that the Tenant's claim of bad faith, as well as its claim for punitive damages in this respect, is not necessary to my ability to determine the plaintiff's claims. The Landlord's own affidavit evidence and contemporaneous statements of its motivations and intentions in withholding consent are sufficient to determine the consent issue.

[55] At the conclusion of the summary trial hearing, the plaintiff passed up several bound sets of written arguments that it had not advanced during the hearing of this summary trial, including extensive objections to the admissibility of Mr. Kotyk's first affidavit. I was initially concerned that, in order to determine the suitability of the plaintiff's summary trial application, the admissibility of the affidavit of the Tenant's key witness should have been at the forefront, and that the Tenant should have had an opportunity to hear and respond to those objections during the course of the hearing.

[56] I have now had the opportunity to read the plaintiff's written submissions, including the Landlord's objections to Mr. Kotyk's affidavit. I find that I am able to consider those objections and resolve them without hearing from the Tenant in

response. Beyond the background facts and exchange of correspondence reviewed above, this affidavit is of limited assistance in interpreting the Lease, which turns on its objective interpretation and not the subjective views of the parties. Similarly, whether the Lease was repudiated by the Tenant does not turn on aspects of Mr. Kotyk's affidavit that are argued to be impermissible evidence of belief, opinion or argument in Mr. Kotyk's affidavit. Instead, I find that the conduct of the parties, together with the contemporaneous correspondence, provides the properly admissible evidence of the Tenant's breach and its nature. I do not rely on Mr. Kotyk's affidavit for any purposes beyond my factual findings above, all of which I find to be properly founded in admissible and largely uncontroverted evidence.

WAS THE SPA CAPTURED BY S. 9(F) OF THE LEASE?

Party Positions

[57] The Landlord says that the Termination Clause falls within s. 9 of the Lease, under the heading "Assignment and Subletting", and that s. 9 governs multiple types of transfers and changes in control, and provides a comprehensive code for all of them, not limited to assignments and subletting *per se*. On this basis, the Landlord argues that the heading "Assignment and Subletting" indicates that *all* of the provisions under s. 9 deal with matters falling within a broader meaning of "assignment and subletting". To avoid any gaps in the application of this entire section, they argue that all of the subsections of s. 9 must apply to all types of transfers, including in s. 9(b) and s. 9(f) where the provisions only refer to "assignments and subletting" and not to the defined "Transfers" in s. 9(a). In this regard, the Landlord argues that the heading of s. 9 should be read broadly and in context to indicate that all of s. 9 deals with all forms of transactions, whether those subsections refer to "Transfers" (as in s. 9(a)(c) and (d)) or "assignments and subletting" (as in s. 9(b) and (f)).

[58] Second, the Landlord notes that the consent standards set out in s. 9(b) on their face only refer to "assignment or subletting," but that Landlord consent is required for all Transfers under s. 9(a). Furthermore, this is a critical provision that prevents the Landlord from unreasonably withholding its consent, subject to specified listed criteria. Because the Landlord has a consent right to all types of "Transfers" under s. 9(a), and not merely requests to assign or sublease (*i.e.*, only

two of the six types of defined Transfers in s. 9(a)), the Landlord argues that "assignment or subletting" in s. 9(b) must also refer to all types of Transfers. The Landlord says that it would make no sense if the Lease only specified consent standards for assignment and subletting but not for any of the other types of "Transfers", such as a change of control. As such, "assignment or subletting" in s. 9(b) must be read to refer to all six types of Transfer, despite not using the word "Transfer".

[59] Similarly, the Landlord argues that because s. 9(c) provides for how the Tenant may request Landlord approval for a Transfer, which clearly refers to all six subsections in s. 9(a), that s. 9(c) should be read together with s. 9(b), providing further evidence that s. 9(b)'s reference only to assignments and sublets is actually meant to cover all defined transfers dealt with in s. 9(a).

[60] Finally, the Landlord argues that the same interpretation of the words "assignment or subletting" in s. 9(b) must also apply to the Termination Clause in s. 9(f). Section 9(f) also refers to "assignment or subletting"; the two provisions must therefore refer to the same thing. The use of the words "assignment or subletting" in s. 9(b) and 9(f) must therefore have a broader meaning, beyond the ordinary meaning of those words, and incorporate all of the transactions defined as Transfers in s. 9(a) as part of a comprehensive scheme.

[61] As such, the Landlord argues that the language of the Lease "provides a valuable right to the Landlord in the event that the Tenant requests consent to the transfer of an ownership interest in the Tenant so as to result in a change in the current control of the Tenant, namely the option to terminate the Lease." It argues that this was the agreement reached between the Tenant and the Landlord, and the parties' agreement "must be given effect."

[62] The Landlord further argues that the Termination Clause does not require that it have any particular reason for termination under s. 9(f), in contrast to the requirement that it not withhold its consent unreasonably under s. 9(b). It argues that s. 9(f) and 9(b) can be understood together because if the Landlord decides to terminate under s. 9(f), the Landlord gives up the benefit of the Lease altogether, whereas if it refuses its consent to a Transfer under s. 9(b) the Lease will still continue. Therefore, the Landlord argues that while it would not be allowed to withhold its consent to a Transfer requested by the Tenant in order to increase the

rents provided for in the Lease because that would not be permitted by s. 9(b), the Landlord may nevertheless terminate the Lease altogether for this purpose because the Termination Clause provides no limits on the Landlord's reasons for exercising its s. 9(f) termination rights, in contrast to the limits set out in s. 9(b).

[63] In this regard, the Landlord argues that its desire to increase the monthly rent it was receiving for rental of the Premises was entirely within its rights as set out in the Lease and can in no way be seen as a bad faith exercise of its discretionary rights under the Lease. Indeed, the Landlord goes so far as to argue that the Supreme Court of Canada's decision in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 [*Wastech*], providing that it is a condition of every contract that contractual discretion be exercised in good faith consistent with the purposes of the contract, has no application in the context of this Lease where the parties have agreed that the Landlord may *unreasonably* refuse to consent under s. 9(b) in some circumstances "in its sole discretion," and where the Lease provided no limits at all on the Landlord's discretion to terminate under s. 9(f).

[64] The Landlord's position on the meaning and scope of the Termination Clause in the Lease is at the heart of the dispute between the parties.

[65] It is acknowledged by the Tenant that the SPA was a "Transfer" as that term is defined in s. 9(a) of the Lease, in that it was a "transfer of an ownership interest" in the Tenant "so as to result in a change in the current control of the Tenant" pursuant to s. 9(a)(3). An assignment or sublet of the Lease also clearly falls within the defined term "Transfer" pursuant to s. 9(a)(1) and (4) respectively.

[66] It is also acknowledged by the Tenant that, pursuant to s. 9(a) and 9(c) of the Lease, the Tenant was required to request consent to any Transfer under s. 9(a) no less than 90 days prior to its effective date. At that time, the Tenant was also required to provide the Landlord with "a written description of all terms and conditions of the proposed Transfer", copies of the "pertinent documentation," and various information about the proposed transferee, including "reasonably satisfactory information about its business and business history," and financial information, including audited financial statements if available, and references "sufficient to enable Landlord to determine the proposed transferee's creditworthiness and character." The Tenant was also required to pay a fee of

$1,000 to the Landlord to defray the Landlord's expenses in reviewing the request, and the Tenant was not to complete the Transfer without the Landlord's prior written consent.

[67] It is also conceded by the Tenant that headings in contracts are part of the context in which they are read, and so the heading "Assignment and Subletting" for the entirety of s. 9 is relevant to the construction of the Lease: *Neely v. MacDonald*, 2014 ONCA 874 at para. 11, adopted in *Yongfeng Holdings Inc. v. Zheng*, 2019 BCSC 1534 at para. 104.

[68] The Tenant's position diverges from the Landlord's with respect to the meaning of the heading of s. 9 "Assignment and Subletting," which the Tenant argues was clearly not meant to deal with all defined "Transfers". Instead, it says that if the intention was that all the "Transfers" listed in s. 9(a) would mean the same thing as "assignment and subletting", the parties could have defined the list of events in s. 9(a) as "Assignment and Subletting" rather than as "Transfers". Instead, the language of the Lease defines "Transfer" as including all those things addressed in s. 9(a), including assignments and sublets of the Lease, but also less consequential changes, including changes in control.

[69] The Tenant argues that s. 9(f), on its face, is restricted to circumstances where the Tenant has submitted a "written request for Landlord's consent to an assignment or subletting". Neither "assignment" nor "subletting" is capitalized or defined in the Lease, but they are separately referenced in s. 9(a) of the Lease and included as two of the six listed events that will be considered a "Transfer". If the parties intended that s. 9(f) would apply to any and all of the defined Transfer events, they would have simply referred to written requests by the Tenant for a "Transfer" in s. 9(f), as opposed to a request for an "assignment or subletting."

[70] Further, the Tenant argues that if this Court finds that s. 9(f) applies to all Transfers, because a reference to "assignment or subletting" is, in fact, a reference to all types of Transfer, then s. (9)(b) of the Lease would also apply to changes in control. Section 9(b) expressly states that the Landlord "shall not unreasonably withhold, delay, or condition its consent to any assignment or subletting of the Premises" provided the proposed transferee meets the consent standards described in that section. The Tenant argues that if s. 9(f) applies to

allow a unilateral, arbitrary termination of the Lease, it would render the protections of s. 9(b) of the Lease meaningless.

[71] In this regard, the Tenant argues that it is difficult to conceive of an interpretation of the Lease in which s. 9(b) and 9(f) can be read together harmoniously. It asks: “How can the Landlord be prohibited from unreasonably withholding consent under section 9(b), while simultaneously retaining an unfettered right to terminate the Lease under section 9(f) in response to the same transfer?” Such a reading, the Tenant argues, would render s. 9(b)’s protections illusory and deprive the Tenant of the protections in the Lease preventing the unreasonable withholding of consent for sublets and assignments. Such an interpretation would be even more untenable if “assignments and sublets” was interpreted to include all types of transactions listed in s. 9(a).

[72] The Tenant argues that the Landlord’s suggested interpretation is not commercially reasonable, and that s. 9(f) is repugnant to the Lease as a whole, relying on the Alberta Court of Appeal’s reasoning in *550 Capital Corp. v. David S. Cheetham Architect Ltd.*, 2009 ABCA 219 at para. 32 [*550 Capital*]. In that case, the lease contained a covenant that the landlord would not unreasonably withhold consent to an assignment (article 10.02), followed by a provision that permitted the landlord to terminate the lease upon receiving a request for assignment (article 10.03). The Court held that the latter clause effectively negated the rights conferred in the former, creating an inconsistency that rendered the termination clause unenforceable, stating:

> [32] … article 10.03 states that notwithstanding section 10.02, if the tenant requests to assign the lease, the landlord has the right to cancel and terminate the lease. The effect of article 10.03 is to fetter and jeopardize, and effectively take away the tenant’s rights agreed to under article 10.02.

[73] The Court in *550 Capital* relied on the principle articulated in *Neelon v. Toronto (City)* (1896), 25 S.C.R. 579 at 598, 1896 CanLII 1, wherein the Supreme Court of Canada described repugnant clauses as those that are mutually exclusive and incapable of standing together. The Court in *550 Capital* then held:

> [34] Article 10.03 is inconsistent with article 10.02. The two articles cannot stand together. The landlord’s right to terminate under 10.03 eliminates its obligation not to unreasonably withhold or delay its consent to an assignment by a tenant under 10.02.

[74] The landlord in *550 Capital* had argued that the clauses were not inconsistent, as they simply provided the landlord with different options: consent, refuse to consent, or terminate. The Court of Appeal rejected this position, reasoning as follows:

> [36] But from a tenant's point of view, there are no options. The tenant can seek consent to assign a lease and, on the basis of article 10.02, expect that the consent will not be unreasonably withheld or on the basis of article 10.03, expect that consent can be unreasonably withheld and the lease may be terminated. The provisions cannot be read harmoniously.

[75] The Alberta Court of Appeal concluded that a tenant should not be placed in a position where, in requesting the exercise of a right conferred by the Lease, it must simultaneously risk the loss of its entire tenancy, because this undermines the commercial purpose of such provisions and creates an imbalance inconsistent with contractual fairness: *550 Capital* at para. 51.

[76] In coming to this decision, the Alberta Court of Appeal reviewed the history of a tenant's transfer rights at common law, and the introduction of termination clauses like the one at issue here, and distinguished earlier decisions of the Alberta Court of King's Bench, including *Orbus Pharma Inc. v. Kung Man Lee Properties Inc.,* 2008 ABQB 754 [*Orbus*] which had found similar "shotgun termination clauses" enforceable on the basis that the tenant had the right to withdraw its request for assignment if the landlord elected to terminate rather than consent. However, without such a safeguard, the Alberta Court of Appeal found that the termination clause lacks commercial reasonableness and effectively makes the tenant's rights unenforceable, such that termination clause must be held unenforceable: *550 Capital* at paras. 48–53.

[77] The Tenant draws direct comparisons to the Termination Clause in the Lease and article 10.03 of the lease in *550 Capital*. The Termination Clause purports to entitle the Landlord to terminate the Lease based solely on the receipt of notice of a sublet or assignment, which is inconsistent with the protection given to the Tenant that such a request not be unreasonably refused pursuant another article of the Lease. There is no option for the Tenant to withdraw its request. As a result, the Tenant argues that the Termination Clause in the Lease is unenforceable even if it did apply to changes in control, and not just the assignments and sublets it references.

[78] Having reviewed the parties' positions, I turn to the principles of contractual interpretation that apply to the interpretation of the Lease.

Principles of Contractual Interpretation

[79] The principles of contractual interpretation apply to the interpretation of the Lease, including the Termination Clause and the question of whether it captures only assignments and sublets of the Tenant, or all "Transfers" defined in s. 9(a), including changes of control.

[80] The approach to contractual interpretation was laid out by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [*Sattva*]:

> [47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). To do so, 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*, at p. 574, *per* Lord Wilberforce)
>
> [48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, *per* Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):
>
> > The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

> . . .
>
> [57] 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).
>
> [58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.
>
> [Emphasis added.]

[81] These principles of contractual interpretation were recently helpfully summarized by Justice Horsman in *Hardy*:

> [23] The principles that govern the interpretation of a contract are well-established. The interpretation of a written contract must be grounded in the text of the contract. While surrounding circumstances may be considered, they cannot be allowed to overwhelm the wording of the agreement so that the court effectively creates a new agreement for the parties: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 at para. 57. Because contractual interpretation is an objective exercise, the relevant surrounding circumstances consist only of objective evidence of the background facts at the time of the execution of the contract; that is, what the parties mutually knew or ought to have known as of the date of the contract: *Sattva* at paras. 49, 58. One party's subjective state of mind or intention has no independent place in the analysis: *S.A. v. Metro Vancouver Housing Corp*., 2019 SCC 4 at para. 30.
>
> [Emphasis added.]

[82] In summary, the interpretation of written contractual provisions "has evolved towards a practical, common-sense approach not dominated by technical rules of construction" and a court will "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": *Sattva* at para. 47.

[83] When considering terms of a contract that may be difficult to reconcile, the BC Court of Appeal's decision in *Athwal v. Black Top Cabs Ltd.*, 2012 BCCA 107 provides some guidance:

> [42] The contractual intent of parties to a written contract is objectively determined by construing the plain and ordinary meaning of the words of the contract in the context of the contract as a whole and the surrounding circumstances (or factual matrix) that existed at the time the contract was made, unless to do so would result in an absurdity. Where the language of a contract is not ambiguous (that is, when viewed objectively it raises only one reasonable interpretation), the words of the written contract are presumed to reflect the parties' intention. An interpretation that renders one or more of the contract's provisions ineffective will be rejected.
>
> [Emphasis added.]

[84] Hence, where an agreement contains "apparent inconsistencies between different terms … the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question:" *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12 at 24, 1993 CanLII 145 [*BG Checo*].

[85] Courts do not prefer interpretations that render contractual terms ineffective and meaningless: *Catherwood Towing Ltd. v. Lehigh Hanson Materials Limited*, 2024 BCCA 348 at para. 123. Only where an interpretation giving reasonable consistency to the terms in question cannot be found will the court rule one clause or the other ineffective: *BG Checo* at 24. Such an interpretation is only to be made as a last resort if an interpretation allowing the provisions to be read harmoniously is not reasonably available.

[86] However, where such reconciliation is impossible, the Alberta Court of Appeal found, in a very similar context to this one, that if a later contractual clause nullifies or contradicts the obligation created by an earlier clause, "the later clause is to be rejected as repugnant and the earlier clause prevails:" *550 Capital* at para. 52.

Determination

[87] First, I consider it essential to consider how the SPA is dealt with in the Lease. The Landlord appropriately does not argue that the SPA amounted to an assignment or sublet by the Tenant of the Premises in the ordinary or commercial sense of those words. I find that the SPA was neither an assignment nor a sublet as those words are ordinarily understood.

[88] It is conceded by the Tenant, and I agree, that the SPA gave rise to a change in control, which is a listed type of defined “Transfer” pursuant to s. 9(a)(3) of the Lease and which requires the Landlord’s consent under the Lease.

[89] The main issue is whether the term “assignment or subletting” in article s. 9(f) of the Lease nevertheless has a broader or special meaning as argued by the Landlord, that includes or captures changes in control such as the SPA, when s. 9 is read as a whole.

[90] On their face, I find that the words “assignment” and “subletting” have a particular and ordinary meaning at law that is distinct from changes in ownership of shares and changes in control.

[91] I also find that s. 9 of the Lease treats assignment and subletting as distinct from changes in control. In this regard, s. 9(a) lists several types of Transfers, with changes in control listed at s. 9(a)(3), assignments at s. 9(a)(1) and sublets at s.9(a)(4). I find that changes in control are addressed distinctly from sublets and assignments under s. 9(a), with each having a separate sub-section of that clause.

[92] Furthermore, I find that the use of a defined term to capture each of subsections 9(a)(1)–(6) as “Transfers” would be entirely redundant if all of the listed transactions under s. 9 were already captured by the heading “Assignment and Subletting.” On its face, I find that the words used in s. 9 objectively define assignments and sublets as only a subset of the broader defined set of “Transfers” under s. 9(a), which term also includes changes in control and corporate reorganizations.

[93] I am not convinced that the use of the term “Assignment and Subletting” as the heading of this section, although relevant context, is capable of overwhelming the ordinary and commercial meaning of those terms, or the fact that each of

these transactions is dealt with separately in s. 9(a)(1) and (4) from changes in control at s. 9(a)(3) and defined as only a subset of the term “Transfer”. Furthermore, the term “Transfer” is not simply defined, but is selectively used in s. 9 of the Lease. In this regard, “Transfer” is used consistently in some sections (such as s. 9(c) and (d)) but not used in other sections in favour of specifically referencing “assignment or subletting,” as in s. 9(b) and (f).

[94] On its face, reading the Lease as a whole, and giving the words used their ordinary and grammatical meaning in their commercial context, including the definition of the term “Transfer” as meaning something more than assignment or subletting within s. 9, and its intentional use in some subsections of s. 9 and not others, I do not accept the Landlord’s argument that the heading of s. 9 makes the use of the term “assignment or subletting” in s. 9(f) applicable to all the defined Transfers in subsections 9(a)(1)–(6).

[95] The Landlord’s strongest argument, in my view, is that s. 9(b) does not use the defined term “Transfer,” and instead refers only to an “assignment or subletting” of the Premises by the Tenant. Section 9(b) provides consent standards, and prohibits the Landlord from unreasonably withholding, delaying or conditioning its consent to a request for “any assignment or subletting” of the Premises, and then sets out a number of minimum criteria that the proposed transferee must meet to engage this prohibition, including that it is creditworthy, and that it is a reputable “authorized Daimler Trucks dealer” that will use the Premises as an authorized Daimler Trucks dealership.

[96] If s. 9(b) does not apply to changes in control, but only to assignments and sublets as ordinarily understood, then the consent standards provided to the Tenant under s. 9(b), which prevents the Landlord from unreasonably withholding consent, would only apply to Tenant requests for assignments and sublets, and not all defined Transfers. There is no other provision that addresses the Landlord’s discretion to consent, or withhold consent, to the other types of defined Transfers in subsections 9(a)(1)–(6). The Landlord identifies a potential gap in the regime that protects the Tenant from unreasonable refusals of other types of Transfers that arguably are of less commercial significance to the Landlord.

[97] On the other hand, the alternative suggested by the Landlord would substantially increase the Landlord’s discretion to terminate the Lease entirely

pursuant to s. 9(f), at its sole discretion and without the constraints and criteria set out in s. 9(b). Section 9(f) also only refers to “an assignment or subletting” and not to the defined term “Transfer.” Section 9(f) allows the Landlord to terminate the Lease altogether “at its option” within 30 days of receiving a written request for “an assignment or subletting” of the Lease.

[98] I agree with the Tenant that it is difficult to reconcile s. 9(b) and 9(f), regardless of whether these provisions are limited to only assignments and sublets, or whether they are also triggered (as the Landlord argues) by any number of other transactions that fall within the defined term “Transfer.” Section 9(b) prohibits the Landlord from withholding or conditioning its consent to such a transaction unreasonably, while s. 9(f) not only allows it to withhold that consent without reference to the constraints in s. 9(b), but to terminate the Lease before such a transaction occurs (and even if it will not occur) without any stated constraints.

[99] Were I to find that the term “assignment or subletting” in s. 9(f) was meant to be construed more broadly than its ordinary or commercial meaning in this Lease, and to have the same meaning as all defined “Transfers” in subsections 9(a)(1)–(6), I would be inclined to follow the Alberta Court of Appeal’s decision in *550 Capital*, which, though not binding on me, is directly on point. Although an Alberta decision, *550 Capital* reviews the common law, and the development of the law in BC in relation to tenant transfers, in a way that I find persuasive.

[100] The Landlord argues that the *550 Capital* decision is not good law in BC, and instead points me to *Orbus*, an earlier decision of the Alberta Court of Kings Bench (that predates *550 Capital* and indeed that is distinguished at paras. 47–48 of *550 Capital*) and the Ontario Superior Court in *Smith v. 2249778 Ontario Inc.*, 2015 ONSC 674, which follows *Orbus* (without reference to *550 Capital*) on this point. They also rely on a 2001 decision where the landlord’s right to terminate seems to have been conceded: *Maverick Professional Services Inc. v. 592423 Ontario Inc.* (2001), 39 R.P.R. (3d) 85, 2001 CarswellOnt 1154 at paras. 8–9 (S.C.J), aff’d 2001 CanLII 8540 (Ont. C.A.). I do not consider the above cases more persuasive than *550 Capital*, and I find that *Orbus* (and *Smith* to the extent that it follows *Orbus*) have been overtaken by *550 Capital,* at least with respect to the particular language of the Termination Clause in the Lease.

[101] Alternatively, the Landlord points to a decision of my own, *1008718 B.C. Ltd. v. Osiria Welding & Fabrication Ltd.*, 2023 BCSC 2001, which it argues supports its position that termination clauses are valid and enforceable in BC. My reasoning in *Osiria* does not, however, stand for that proposition. It is of no assistance to the Landlord in this case.

[102] The Landlord correctly points out that the threshold to find that two lease provisions are irreconcilable is very high: *Fuller v. Aphria Inc.*, 2020 ONCA 403 at para. 59, citing *BG Checo* at 24. However, that threshol