

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Central College Healthcare Centre Inc. v.
Access West Holdings Inc.*,
2025 BCSC 2292

Date: 20251121
Docket: S229497
Registry: Vancouver

Between:

Central College Healthcare Centre Inc.

Plaintiff

And

Access West Holdings Inc. and Quantum Parcel Services Ltd.

Defendants

Before: The Honourable Justice Giaschi

Reasons for Judgment

Counsel for the Plaintiff: D. Kang

Counsel for the Defendants: G. Badh

Place and Date of Trial: Vancouver, B.C.
October 31, 2025

Place and Date of Judgment: Vancouver, B.C.
November 21, 2025

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Introduction

[1] This matter concerns a dispute over a sub-lease agreement dated May 4, 2022 and amended on May 17, 2022.

[2] The plaintiff alleges that Access West Holdings Inc. (“Access”) breached and repudiated the sub-lease agreement and is liable to it in damages. The plaintiff additionally alleges that Quantum Parcel Services Ltd. (“Quantum”) agreed to indemnify it in the event that Access breached the sub-lease agreement. The plaintiff now applies by way of summary trial for judgment against the defendants jointly and severally.

[3] The defendants allege that the plaintiff breached the sub-lease agreement and that Access was entitled to terminate the agreement. They apply by way of summary trial for the return of a deposit and the return of an advance payment of one month's rent. The defendants additionally deny that the indemnity agreement is enforceable as against Quantum.

Suitability for Summary Trial

[4] The parties are agreed that this matter is suitable for summary trial. I agree. I am satisfied that I can find the facts necessary to determine the matters in dispute and that it would not be unjust to do.

Facts

[5] The facts are for the most part not in dispute.

The Head Lease

[6] By commercial lease agreement dated June 12, 2018 (the “Head Lease”), between Henderson Development (Canada) Ltd., as landlord and the plaintiff, as tenant, the plaintiff leased units 213 to 218 at 181 Keefer Place, Vancouver (the “Premises”) for a period of five years commencing on November 1, 2018.

[7] The terms of the Head Lease included:

4.5 Payment of Rent Generally – All payments of rent by the tenant to the landlord required or contemplated by this Lease shall be:

...

(e) subject to an overdue charge if such payment is not made when due, which charge shall be Additional Rent equal to 24% per annum of the overdue amount payable with the next monthly installment of Minimum Rent, all without prejudice to any other right or remedy of the Landlord; and

...

11.1 Tenant's Insurance

(a) The Tenant shall take out and keep in full force and effect throughout the Term and during such other time as the Tenant occupies the Premises or any part thereof:

(i) commercial all-risk insurance ...

...

(iii) comprehensive general liability insurance, ...

(iv) tenants legal liability insurance ...

...

(b) Each policy of insurance required of the Tenant as aforesaid shall name the Landlord and any persons or corporations designated by the Landlord as additional named insureds as their interests may appear and shall include a waiver of rights of subrogation

All such policies will be with insurers acceptable to the Landlord and in a form and content satisfactory to the Landlord and the Tenant...

16.2 Assignment and Subletting - In the event that the Tenant requests to assign or sublet its Lease, the following provisions shall apply:

(a) The Tenant shall not enter into a Transfer of this Lease in whole or in part, nor part with possession of all or any part of the Premises, without the prior written consent of the Landlord which consent shall not be unreasonably withheld. The Landlord and the Tenant agree that, notwithstanding any statutory provisions to the contrary, the Landlord shall be entitled to withhold its consent to a Transfer (and the Tenant acknowledges that in so doing, the Landlord shall not be acting unreasonably) if:

...

(ii) at least thirty (30) days prior to the proposed effective date of the Transfer, the Tenant has not delivered to the Landlord:

A. a copy of the proposed Transfer (including the identity of the Transferee);

B. reasonably detailed information as to the character, reputation and business experience of the Transferee;

C. financial information and bank references of the Transferee (including the most recent financial statements of

the Transferee) certified by the chief financial officer of the Transferee (if the Transferee is a corporation);

D. the names and addresses of the beneficial owners of the shares of any proposed corporate Transferee; or

...

18.5 Costs and Interest - All expenses, costs and expenditures including, without limitation, solicitor and own client costs and accounts, incurred by the Landlord as a result of any default by the Tenant shall forthwith on demand be paid by the Tenant as Additional Rent together with interest, at the rate specified in Section 4.5(e), from the date any such expenses, costs and expenditures are incurred by the Landlord until the same are fully paid and satisfied.

The Sublease

[8] In or about early 2022, Access was planning to enter into the vocational education business and hired a realtor, Adam Goss, to find suitable premises to operate a vocational college. Mr. Goss has not filed an affidavit in this matter.

[9] Also, in early 2022, the plaintiff decided to sublet the Premises and retained a realtor, Chris Oteman, to find a subtenant. Mr. Oteman has sworn two affidavits in this matter: affidavit #1 made July 24, 2023 and affidavit #2 made October 10, 2025. In his affidavit #1, he deposes that he conducted all negotiations on behalf of the plaintiff and that all of the negotiations were conducted through Mr. Goss. He attaches the entirety of their email communications to his affidavit #1.

[10] On April 12, 2022, Mr. Goss contacted Mr. Oteman by email inquiring if the Premises were still available. Mr. Oteman responded that the Premises were available and provided a floor plan. The two of them then arranged for a viewing of the Premises on the next day.

[11] On Wednesday, April 18, 2022, Mr. Goss emailed Mr. Oteman advising that his client was interested and requested a second viewing of the Premises. Mr. Oteman responded that he could do a second viewing the next day or the day after.

[12] On May 3, 2022, Mr. Goss emailed Mr. Oteman with an offer to sublease the Premises at \$28 per square foot. The original draft of the offer to sublease that was purportedly attached to the email of Mr. Goss is not included in the materials before

me. However, it is apparent that over the next few days, Mr. Goss and Mr. Oteman made some changes to the draft.

[13] On May 5, 2022, Mr. Oteman delivered a counteroffer to Mr. Goss. His email provided:

Hi Adam,

Thanks for your patience. Please find the attached signed counter offer for 181 Keefer Place. I've incorporated your terms on our standard form of sublease and only a few items have been countered. See details below:

Basic Rent: \$23.00 psf.

Additional Rent: \$15.74 psf. for 2022 based of their rent schedule from the landlord. (corrected from \$12.75 psf.)

Fixturing Period: Changed that the Subtenant would not be responsible for rent for the duration of the Fixturing period.

Deposit: Changed to be payable to NAI Commercial in Trust.

Subtenant and Sublandlord's Conditional period: Changed to 5 business days from 10 business days.

Furniture: Changed that the Sublandlord keeps ownership of furniture but the Subtenant can use it at no charge during the Term.

The rest of the terms have remained the same.

[14] On May 9, 2022, the plaintiff and Access entered into a sublease agreement dated for reference May 4, 2022.

[15] The sublease contained the following relevant terms:

2. Offer Incorporated into the Sublease

This Offer is to Sublease the Premises upon the terms and conditions set forth in the Sublandlord's head lease for the Premises (the "Lease"), a copy of which shall be provided to the Subtenant forthwith upon acceptance.

3. Term and Rent

The Sublease shall commence on August 1, 2022 (the "Commencement Date") and terminate on October 30, 2023 (the "Expiry Date") (the "Term") at a net rate of:

Commencement Date - October 30, 2023: \$23.00

per square foot per annum, payable in equal monthly installments of one-twelfth the annual base rent in advance on the first day of each month of the Term. All payments shall be made to an address to be provided to the Subtenant by the Sublandlord upon acceptance of this Offer.

4. Fixturing Period and Early Occupancy

Provided the parties remove their respective conditions precedent herein, the Landlord has provided their written consent to the Sublease, the Deposit has been paid, proof of insurance has been provided to the Sublandlord, the Subtenant will have from June 1, 2022, until the Commencement Date to enter the Premises to install leasehold improvements, trade fixtures and to conduct its business: During this period the Subtenant will be bound by the terms of the Lease and the Sublease Agreement, except those requiring payment of rent, operating expenses or taxes. The Subtenant shall be responsible for the hydro and utilities during the Fixturing Period and the Term.

...

11. Insurance

The Subtenant agrees to maintain during the Term of the Sublease the insurance required under the Lease and to name the Landlord and the Sublandlord as additional insureds on such insurance. Copies of the certificates for such insurance shall be delivered to the Sublandlord prior to the Subtenant taking possession of the Premises.

...

14. Sublease Agreement

This Offer to Sublease, once the parties' respective conditions precedent are removed and the Landlord has provided their consent as described in the Lease, shall, together with the Lease, *form* the formal sublease agreement or if the Sublandlord and Landlord agree, the formal assignment agreement.

15. Subtenant's Conditions Precedent

This Offer to Sublease is subject to the following conditions and must be removed in writing on or before 5:00 p.m., five (5) business days after acceptance:

- i) The Subtenant being satisfied with the Sublandlord's Lease; and
- ii) The Subtenant confirming its use will be permitted in the Premises by the City of Vancouver. The above conditions are for the sole benefit of the Subtenant and may be waived by the Subtenant only. The Subtenant has the right to waive the conditions at any time within the time specified at its discretion and proceed with the agreement. The Subtenant agrees to make all reasonable efforts to remove the conditions. In the event the conditions are not fulfilled or the Subtenant does not waive the subject conditions in writing within the time specified, then this Offer shall be terminated.

16. Sublandlord's Condition Precedent

This Offer to Sublease is subject to the following conditions and must be removed in writing on or before 5:00 p.m., five (5) business days after acceptance:

- 1) The Sublandlord approving the financial covenant of the Subtenant.

The above condition is for the sole benefit of the Sublandlord and may be waived by the Sublandlord only. The Sublandlord has the right to waive the conditions at any time within the time specified at its discretion and proceeds with the agreement. The Sublandlord agrees to make all reasonable efforts to remove the condition. In the event the condition is not fulfilled or the Sublandlord does not waive the subject condition in writing within the time specified, then this Offer shall be terminated.

17. Landlord's Consent

This Sublease is subject to the Landlord's written consent as described in the Lease.

18. Deposit

Within two business days of unconditional acceptance of the Offer to Sublease, the subtenant shall submit its deposit cheque in the amount equivalent to two months average gross rent...

If the Landlord's consent is not received within the time period outlined in the Lease, this offer shall be null and void...

...

22. No Other Agreements

It is agreed and understood that no agreements, representations, warranties or conditions relating to the Premises or the contents of this offer have been made except as are expressly set out herein, unless signed and dated by both parties.

[16] It is to be noted that the term of the sublease was from August 1, 2022 to October 30, 2023, however, pursuant to and subject to clause 4, Access was given access to the Premises from June 1, 2022 to install improvements and conduct its business on a rent-free basis. Much of this dispute revolves around the meaning and effect of clause 4.

Pre-Contractual Representations

[17] The defendants allege in their amended response to claim and counterclaim that various representations, warranties and assurances were made by the plaintiff during the course of the negotiations leading to the sublease. In particular, it is alleged that:

- a) The plaintiff warranted the head landlord's consent to the sublease would be easily obtained and that there would be no impediment or delay in obtaining such consent (Response para. 5; Amended Counterclaim para. 11);
- b) The plaintiff was aware at all times that Access "required an adequate period of time to set up its infrastructure and modify the Premises" (Response para. 6; Amended Counterclaim para. 12); and
- c) The plaintiff provided an assurance/warranty "the Landlord would provide timely approval of the sublease, on May 17, 2022" (Response para. 11; Amended Counterclaim para. 17).

[18] The only evidence of these allegations is in the affidavit of Mr. Daljeet Singh, a director of both Access and Quantum, made October 22, 2025. In that affidavit, he deposes:

- a) It was "made abundantly clear" to the plaintiff that Access would require a period of time to modify the premises (para. 10);
- b) It was agreed that Access would have two months' rent free to modify the premises (para. 12);
- c) Access was assured by the plaintiff's representative that the landlord would take a couple of weeks to approve the sublease (para. 19);
- d) An "assurance/warranty" was provided that the landlord would provide timely approval of the sublease (para. 23); and
- e) He "was always given the impression" by the plaintiff that Access would be given two months' rent free as and when access to the Premises was granted (para. 27).

[19] I do not accept any of the above evidence of Mr. Singh for three reasons.

- a) First, his evidence is inadmissible hearsay. At his examination for discovery, he admitted that the negotiations were conducted solely between Mr. Oteman and Mr. Goss and that he had no direct communication with the plaintiff or with Mr. Oteman. Accordingly, he has no firsthand knowledge of what was said during the negotiations and what representations, assurances or warranties were verbally given;
- b) Second, his evidence is not corroborated by the emails exchanged during the negotiations leading to the sublease; and
- c) Third, but most significantly, his evidence is contrary to the evidence of Mr. Oteman, whose evidence I do accept. In his affidavit #1, Mr. Oteman expressly deposes that no promises, representations or warranties were made to Mr. Goss or Access other than those contained in the written agreement. In his affidavit #2, he additionally deposes he did not advise Access or Mr. Goss that there would be no impediment to, or delay in, obtaining the landlord's consent to the sublease and he did not guarantee or advise of a specific timeline.

[20] Accordingly, I find as a fact that none of the pleaded representations, warranties or assurances were made by the plaintiff.

Events Subsequent to Signing

[21] By email dated May 9, 2022, Mr. Oteman delivered the signed copy of the sublease to Mr. Goss as well as a copy of the Head Lease. He noted the offer was conditional until May 16. He also requested that he be provided with the financial statements of Access for the prior two years.

[22] On May 11, 2022, Mr. Goss provided Mr. Oteman with the "financial documents" together with advice that the company was wholly owned by Mr. Singh. Mr. Oteman responded, requesting the "incorporation documents" for both companies and asked if Quantum would be willing to "indemnify the sublease" since Access was a new company.

[23] On May 12, 2022, Mr. Goss provided Mr. Oteman with the incorporation documents for both Access and Quantum.

[24] Also on May 12, 2022, Mr. Oteman provided Mr. Goss with a list of the information the head landlord required as per clause 16 of the Head Lease.

[25] On May 16, 2022, Mr. Oteman followed up with Mr. Goss concerning the “questions from the landlord”. Also, on May 16, the parties agreed to an extension of time within which to remove the conditions in clauses 15 and 16 of the sublease.

[26] On May 17, 2022, the plaintiff, Access and Quantum entered into a further agreement in the following terms:

In consideration of \$10.00 non-fundable paid by the Subtenant to the Sublandlord and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged between the parties, the parties hereto agree as follows:

Further to the Offer to Sublease dated May 4th, 2022 (the “Offer”), the Subtenant and the Sublandlord acknowledge and agree to amend the offer by inserting the following Indemnity Clause:

Indemnity:

In consideration of the sum of One Dollar (\$1.00) now paid to Quantum Parcel Services Ltd. the “Indemnifier) by the Sublandlord (the receipt and sufficiency of which is hereby acknowledged) and in further consideration of the Sublandlord accepting this Offer to Sublease, the Indemnifier hereby agrees to indemnify the Sublandlord for the due performance of all of the covenants and agreements of the Subtenant under this Offer to Sublease and the Sublease. The Indemnifier shall execute and deliver to the Sublandlord on the earlier of the date the Subtenant executes and delivers the Sublease or the date the Subtenant takes possession of the Premises, an agreement in form satisfactory to the Sublandlord confirming such indemnity. If the agreement referred to above has not been executed and delivered to the Sublandlord on or before the date set out above, then the Sublandlord may, at its option and in its sole discretion, terminate this Offer to Sublease and the Sublease by delivering written notice thereof to the Subtenant. In the event that the indemnifier consists of more than one person, the indemnity referred to above shall be a joint and several indemnity.

Furthermore, the Subtenant and Sublandlord also agree to hereby remove all of the Subtenant’s and Sublandlord’s Conditions Precedent described in Clause 15 and 16 as follows:

Clause 15:

- I. The Subtenant being satisfied with the Sublandlord’s Lease;
- and

II. The Subtenant confirming its use will be permitted in the Premises by the City of Vancouver.

Clause 16:

I. The Sublandlord approving the financial covenant of the Subtenant.

Upon removing all Condition Precedents above, the Offer will be considered firm and binding only conditional upon the Landlord's consent to this Sublease and time shall remain of the essence.

[27] It is to be noted that the May 17 agreement addressed two things. First, it purported to amend the sublease to include the indemnity clause set out. Second, it removed the conditions precedent contained in clauses 15 and 16.

[28] On May 18, 2022, Mr. Oteman advised Mr. Goss that the deposit was \$38,958.46 and was then due. He also noted the deposit would be held in trust and returned if the head landlord did not provide consent to the sublease.

[29] On May 20, 2022, the deposit of \$38,958.46 was paid. I note that Mr. Singh deposes that he paid the deposit based on the assurance/warranty of the plaintiff that the landlord would approve the sublease in a timely fashion. I reject this evidence for the reasons already given.

[30] On May 31, 2022, the corporate documents that Mr. Oteman had requested from Mr. Goss were received by him and forwarded to the head landlord.

[31] As of June 1, 2022, the date that Access was to have possession of the Premises pursuant to clause 4 of the sublease, the landlord had not yet provided consent to the sublease and Access had not yet provided proof of insurance to the plaintiff. Accordingly, June 1, 2022, passed without Access entering into possession of the Premises.

[32] I note Mr. Singh deposes that Access was denied possession of the Premises on June 1, 2022. I do not accept this evidence as it is inconsistent with the communications between Mr. Oteman and Mr. Goss. There was no request from Access to enter into the Premises on June 1, 2022 and no denial of such a request. In fact, there is nothing in the emails between Mr. Oteman and Mr. Goss suggesting

that Access expected to enter into the Premises on June 1, 2022. To the contrary, the communications indicate they were working towards the removal of the conditions in clause 4 of the sublease.

[33] I find as a fact that Access was not denied possession of the Premises on June 1, 2022, rather, I infer that as of June 1, 2022, both parties knew that Access had no right to enter into the premises because the conditions of clause 4, the landlord's consent and proof of insurance, had not yet been complied with.

[34] Mr. Oteman deposes that on June 17, 2022, the landlord approved the sublease of the Premises. On that same day, he sent the sublet consent form to Mr. Goss with a request that it be executed and returned for him to attend to the execution by the plaintiff and head landlord. The sublet consent form provides that it was executed on June 21, 2022. What I infer from this evidence is that, although the written consent is dated June 21, 2022, the head landlord verbally consented to the sublease on June 17, 2022.

[35] On June 28, 2022, Mr. Oteman requested an update from Mr. Goss on the status of the "tenant's insurance". He specifically noted that both the head landlord and the plaintiff had to be added as "additional insurers" [stet] and advised that the details could be found in the lease document, a reference to the tenant's insurance clause of the Head Lease.

[36] On July 4, 2022, Mr. Goss provided Mr. Oteman with a quote for an insurance policy and requested his advice as to whether it was adequate. The next day, July 5, Mr. Oteman advised Mr. Goss that, among other changes, the insurance had to include the head landlord and the plaintiff as additional insureds, an express requirement of clause 11 of the sublease agreement.

[37] On July 7, 2022, Mr. Goss and Mr. Oteman communicated in relation to a difference of opinion as to the commission payable under the sublease. Although that is not an issue before me, it is noteworthy that Mr. Goss said the following:

We raised the issue regarding the fixturing period being greatly diminished which reduced the amount of “free rent” provided to the subtenants as it was conceived in the original offer. The sublandlord’s response was that we have a contract and this was simply an unfortunate matter due to delays on both sides which is understandable. Similarly, I’d say the contract states the figure for remuneration clearly.

[38] On July 18, 2022, Mr. Goss provided Mr. Oteman with the updated insurance certificate. On the same day, Mr. Oteman asked Mr. Goss if he wished to pick up the key. It is at this point that counsel became involved.

[39] On July 27, 2022, Mr. Goss wrote to Mr. Oteman as follows:

Hey Chris, hope this email finds you well, hate to be a bother while you’re on vacation!

I’ve chatted and met with Dal this week regarding our sublease deal on 181 Keefer and the first payment date upcoming on August 1st.

He still feels strongly that they were entitled to a 2-month period of time, or thereabouts, of unpaid access to the units in order to prepare the space so it would be fit for their business. I brought this up to you briefly before and understand your clients opinion at the time was that it was due to unfortunate delays from both the subtenant and the landlord. I’ve discussed this at length with Daijeet and reviewed the contract with him. ...

It is in his opinion that they should have had the opportunity to gain access much sooner having removed conditions and provided a deposit. He believes the delays were largely due to the landlord’s consent but that this item of the contract does not note anything about landlord’s consent He feels strongly that had he been given the opportunity to obtain keys he could have expedited the insurance and then begun preparing the space sometime during June and through July. He believes the essence of the contract/offer was that these two months of unpaid rent were to be provided and that he has not received fair value for this.

He’s instructed me to discuss this matter with you and seek a resolution. His initial belief is the first rent payment should be set back by a period of time comparable to that he believes he was entitled to under the contract. I’ve spoken to him at length about this and the issues. I also understand the burden this lease payment has been on Central College and desire for relief. I’ve pushed him to be flexible and following our most recent meeting on this issue, Dal has expressed he’d be open to a resolution that breaks up the 2-months rent over a specific term of the lease. At least this way Central College would begin receiving payments to offset their expenses.

[40] Mr. Oteman relied on July 29, 2022 as follows:

Hi Adam,

Thank you for your email and for all of your efforts and work thus far.

The Early Occupancy/ Fixturing Period in the offer to lease was set for June 1, 2022, however, the date was contingent on the Landlord providing their written consent to the Sublease, the Deposit being paid, and proof of insurance being provided to the Sublandlord, as outlined in Clause 4 in the offer and shown below. It doesn't state a set 2-month period after the conditions are met.

...

The correct insurance was not provided until July 18th, so the keys could not have been handed to the Subtenant until this date and they could not take possession of the premises until the correct insurance was obtained and provided, as per Clause '11 in the offer and shown below:

...

I'll inform Central College of Dal's concern and let you know their comments but as of now, the rent due by Access West, per the offer and agreement, is set for the commencement date of August 1.

Repudiation

[41] Also on July 29, 2025, counsel for Access wrote to the plaintiff advising that the plaintiff had breached the contract by not providing access to the premises on June 1, 2022. Notwithstanding this allegation, Access made the August 1 rent payment under protest and on a without prejudice basis. Access also requested that it be given possession of the Premises on a rent-free basis for the months of August and September.

[42] On August 2, 2022, counsel for the plaintiff responded, denying the plaintiff had breached the agreement and advising that the delays in satisfying the conditions of clause 4 were due to the fault of Access. Plaintiff's counsel further advised that Access had no legal grounds to request an additional two months rent-free.

[43] On August 30, 2022, counsel for Access reiterated its position that the plaintiff had breached the lease by not providing it access to the Premises on June 1, 2022, and advised that Access was electing to terminate the sublease. The return of the deposit and the August rent payment were also requested.

[44] On September 26, 2022, the plaintiff accepted the repudiation of the agreement but reserved its rights to indemnity and to damages.

Efforts to Sublet

[45] Mr. Pan deposes that he instructed Mr. Oteman to relist the premises. The premises were relisted for sublease on October 6, 2022 and the listing was sent to commercial brokers by Mr. Oteman on October 11, 2022. Mr. Oteman deposes that he continued to market the premises throughout 2023 but no subtenant was found.

[46] The Head Lease expired on November 17, 2023.

Positions of the Parties

[47] In summary, the plaintiff submits that Access contracted to rent the premises from August 1, 2022 to October 30, 2023, that it paid the first month's rent and then wrongfully breached and repudiated the agreement on August 30, 2022. The plaintiff says it is entitled to damages against the defendants, jointly and severally, pursuant to the indemnity clause of the sublease. It also claims, pursuant to the incorporated terms of the Head Lease, interest at the rate of 24% per annum and solicitor client costs.

[48] In respect of clause 4 of the sublease agreement, the plaintiff submits that this clause did not alter or modify the term of the lease or the obligation of Access to pay rent during the entire term. They say clause 4 of the agreement merely permitted Access to enter into the premises prior to the commencement of the term, provided the conditions of clause 4 were satisfied.

[49] The defendants submit that the terms of the sublease agreement, when properly interpreted, obliged the plaintiff to provide two months of rent-free possession of the Premises. The defendants say the plaintiff breached by agreement by denying Access possession of the Premises on June 1, 2022 and by refusing to give Access a two-month rent-free period once it was entitled to possession of the Premises. The defendants seek the return of the deposit and the August rent. I observe that, although the defendants pleaded entitlement to

additional damages, at the hearing before me, they advised that they were restricting their claim to the return of the deposit and August rent.

[50] The defendants additionally submit that the sublease became null and void when the head landlord failed to provide consent to the sublease within 30 days. This defence was not pleaded.

[51] The defendants did not make submissions relating to the various assurances and warranties they pleaded were made by the plaintiff and which were addressed in the affidavit of Mr. Singh. I presume they did not do so as they were no longer advancing an argument based on the alleged assurances and warranties. In any event, I have found that none of the pleaded representations, warranties or assurances were made by the plaintiff and, therefore, need not consider this argument further.

Issues

[52] The main question before me is the proper interpretation of the sublease to determine the rights and obligations of the parties thereunder, namely:

- a) Was the plaintiff obliged to give Access possession of the Premises on June 1, 2022; or
- b) Was the plaintiff obliged to provide two months' rent free from the date that Access was entitled to possession of the Premises; or
- c) Was the rent-free period only from June 1 to August 1, 2022, and exercisable only upon satisfaction of the conditions set out in clause 4 of the sublease?

[53] A secondary issue is whether the indemnity clause is valid and enforceable as against Quantum.

Analysis

The Interpretation of the Sublease

[54] The principles regarding the interpretation of contracts are well established. In *Interfor Corporation v. Mackenzie Sawmill Ltd.*, 2022 BCCA 228, Justice Fisher described the exercise of contractual interpretation as follows:

[35] The exercise of contractual interpretation was succinctly described by MacKenzie J.A. in *Blackmore Management Inc. v. Carmanah Management Corporation*, 2022 BCCA 117:

[32] Contractual interpretation is a practical, common-sense exercise to determine the objective intentions of the parties: *Sattva* at para. 47. Intentions are determined by reading the contract as a whole, giving words their ordinary and grammatical reading in light of the surrounding circumstances at the time of contracting: *Sattva* at para. 47. Surrounding circumstances can assist in ascertaining the meaning of the contract but cannot overwhelm the words: *Sattva* at para. 57.

[36] Ultimately, the interpretation of a provision in a written contract must always be grounded in the text, supported by its plain language, and read in light of the entire contract: *Sattva* at para. 57; *Canaccord Genuity Corp. v. Reservoir Minerals Inc.*, 2019 BCCA 278 a para. 21.

[55] More recently, in *Hardy v. Graham*, 2024 BCCA 67, Justice Horsman wrote:

[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.

[56] In *Piquancy Enterprises Ltd. v Centurion Apartment Properties (Scott Road 1) Inc.*, 2024 BCSC 204, Justice Basran succinctly summarized some of the applicable principles as follows:

[53] When interpreting agreements, the overarching principles to be considered include:

- a) the court must ask what the intentions of the parties were at the time the agreements were made;
- b) the words in the contract should be given their plain and ordinary meaning, while being construed in the context of the agreement as a whole;
- c) the words of the agreement must be considered in the context of the factual matrix of events preceding the making of the agreement;
- d) the parties' subjective intentions are not to be considered—the interpretation is based on the perspective of a reasonable person informed by an objective assessment of the surrounding circumstances known at the time; and
- e) the court looks to give words their plain and ordinary meaning, considering the context of the agreement as a whole and the surrounding circumstances to determine whether there is only one reasonable meaning of the words in question, or whether the meaning of the words is ambiguous in the sense of being reasonably capable of two different interpretations.

See: *Low v. Straiton Development Corporation*, 2022 BCSC 302 at para. 56.

[57] In my view, when the sublease agreement is interpreted in accordance with these well recognized principles, Access was not entitled to possession of the Premises unless and until it satisfied the conditions set out in clause 4 of the sublease agreement. Moreover, it was not entitled to two months' rent free from the date it entered into possession of the Premises. Rather, it was entitled to free rent only from the date it entered into possession pursuant to clause 4 to July 31, 2022. Thereafter, from August 1, 2022, it was required to pay monthly rent.

[58] The main flaw in the defendants' submissions is that they fail to recognize that the sublease addresses two distinct periods. One period is the Term of the Sublease, which is defined in clause 3 as from August 1, 2022 to October 31, 2023. The other period is the "Fixturing Period and Early Occupancy" period addressed in clause 4 which runs "from June 1, 2022, until the Commencement Date", a defined term meaning August 1, 2022. These two periods address different time frames and provide for different rights and obligations in relation to the requirement to pay rent. The defendants improperly conflate these two distinct periods, which does violence to the language used in the sublease.

[59] The meaning of clause 4 of the sublease is, in my view, clear and unambiguous. The words of clause 4 do not give Access an unconditional right to possession of the Premises on a rent-free basis from June 1, 2022. Rather, the right to early occupancy is expressly dependent upon the satisfaction of the several conditions set out in clause 4. No other meaning can be ascribed to the words used. Moreover, the actions and communications of the parties support that this was their interpretation of the agreement and their mutual intention. As I have indicated, there was no request from Access to enter into the Premises on June 1, 2022, and the communications between Mr. Oteman and Mr. Goss indicate they were working towards the removal of the various conditions so that Access could enter into early occupancy of the Premises.

[60] The defendants submit that business efficacy and the officious bystander test support an interpretation of the sublease as requiring two months free rent from the date Access first entered into possession of the premises. I observe that the defendants appear to misuse these tests as interpretative tools, whereas they are, in fact, tests to determine whether additional terms should be implied into a contract.

[61] The Supreme Court of Canada addressed implied terms in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, 1999 CanLII 677 (SCC) [*M.J.B.*]. The three circumstances where terms may be implied into a contract are set out at para. 27, as follows:

27 The second argument of the appellant is that there is an implied term in Contract A such that the lowest compliant bid must be accepted. The general principles for finding an implied contractual term were outlined by this Court in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, 1987 CanLII 55 (SCC), [1987] 1 S.C.R. 711. Le Dain J., for the majority, held that terms may be implied in a contract: (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary “to give business efficacy to a contract or as otherwise meeting the ‘officious bystander’ test as a term which the parties would say, if questioned, that they had obviously assumed” (p. 775). See also *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701, at para. 137, per McLachlin J., and *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986, at p. 1008, per McLachlin J.

[62] The defendants rely on the third category of implied terms based on the presumed intentions of the parties. This category was further described at para. 29 of *M.J.B.*, as follows:

29 As mentioned, LeDain J. stated in *Canadian Pacific Hotels Ltd.*, *supra*, that a contractual term may be implied on the basis of presumed intentions of the parties where necessary to give business efficacy to the contract or where it meets the “officious bystander” test. It is unclear whether these are to be understood as two separate tests but I need not determine that here. What is important in both formulations is a focus on the intentions of the actual parties. A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. As G. H. L. Fridman states in *The Law of Contract in Canada* (3rd ed. 1994), at p. 476:

In determining the intention of the parties, attention must be paid to the express terms of the contract in order to see whether the suggested implication is necessary and fits in with what has clearly been agreed upon, and the precise nature of what, if anything, should be implied.

[63] In my view, there is no basis for implying a term of the sort suggested by the defendants. The term they seek to imply is inconsistent with the express terms of the sublease agreement. Clause 3 of the agreement provided for a rental period of 15 months commencing August 1, 2022 at the stipulated amount of rent. Implying a term that gives Access two months rent free during this period is completely inconsistent with the express terms of clause 3. Additionally, the implied term is inconsistent with the clear wording of clause 4. That clause clearly establishes the fixturing or early occupancy period as being “from June 1, 2022, until the Commencement Date”, a defined term meaning August 1, 2022. By the clear words used, the fixturing period was to end by August 1, 2022. Implying a term that would extend the fixturing period beyond August 1, 2022, would be inconsistent with clause 4.

[64] The defendants additionally submit the sublease agreement is ambiguous and should be interpreted *contra proferentum* or against the interests of the plaintiff.

[65] The first alleged ambiguity is in relation to the commencement date in clause 3 of the agreement, which provides:

The Sublease shall commence on August 1, 2022 (the "Commencement Date") and terminate on October 30, 2023 (the "Expiry Date") (the "Term") at a net rate of:

Commencement Date - October 30, 2023: \$23.00

per square foot per annum ...

[Emphasis added.]

[66] The defendants say this clause provides two commencement dates, August 1, 2022 and October 30, 2023. I disagree. The first part of the clause clearly provides the sublease was to commence on August 1, 2022 and defines this date as the "Commencement Date". The line alleged by the defendants to contain a different commencement date is the line reading "Commencement Date - October 30, 2023: \$23.00". In my view, this line does not denote a different commencement date. On a proper reading, it denotes the rent applicable during the period from the Commencement Date to October 23, 2023. Additionally, and importantly, no one has deposed that they misunderstood the commencement date to be other than August 1, 2022.

[67] The defendants additionally submit that there is an ambiguity concerning the obligation of Access to provide proof of insurance. They say the agreement does not specify what is required for proof of insurance and they also submit that there is an inconsistency between the insurance requirements of clause 4 and clause 11 of the sublease. They say that clause 11 only requires Access to maintain insurance "during the Term of the Sublease", which is from August 1, 2022 to October 31, 2023, whereas clause 4 requires it to have insurance before the commencement of the Term.

[68] I do not agree that there is an inconsistency or any ambiguity in relation to the obligation of Access to provide proof of insurance or the period for which it was to have such insurance. The proof of insurance required is set out in clause 11, namely, a certificate of insurance, which is what was obtained. Concerning the

period of the insurance, clause 4 clearly specified that proof of insurance had to be provided before early access to the premises was given. Clause 11 did likewise. Clause 11 expressly required Access to provide a certificate of insurance “prior to the Subtenant taking possession of the Premises “. Additionally, the correspondence between Mr. Oteman and Mr. Goss indicates that the parties were under no misapprehension as to the meaning and effect of the insurance requirements in clause 4 or 11.

[69] Thus, in my view, there are no ambiguities or inconsistencies that render the agreement subject to the rule of *contra proferentum*. In any event, the doctrine of *contra proferentum* has no application as it has not been proven the plaintiff drafted the impugned provisions, especially clause 4. Based on the evidence, the first draft of the agreement was done by Mr. Goss, the defendant’s agent, and sent to Mr. Oteman on May 3, 2022. The defendants have not shown which parts of the document the plaintiff authored.

[70] The defendants additionally submit that the sublease became null and void when the head landlord failed to provide consent to the sublease within 30 days. In support of this submission, the defendants rely on clause 18 of the sublease and clause 16.2 of the Head Lease. Clause 18 of the sublease provides the offer is null and void if the Landlord’s consent is not received within the time stipulated in the Head Lease. The defendants submit that clause 16.2(a)(ii) of the Head Lease stipulates that the consent must be given within 30 days. There are several difficulties with this submission. First, the defendants did not plead the agreement was null and void. Second, clause 16.2(a)(ii) of the Head Lease does not state that the landlord must give consent within 30 days. It merely provides that the landlord cannot be taken to have acted unreasonably if the required documents are not provided to the landlord within 30 days of the effective date of the sublease. Third, none of the parties purported to terminate the contract due to non-receipt of the head landlord’s consent and, in fact, both parties treated the contract as continuing.

[71] The defendants finally submit that it was the clear intention of the parties that Access would have a two-month rent free period in which to prepare the Premises and that the agreement should be interpreted to give effect to this intention. I do not agree. The clear intention of the parties is as expressed in the agreement, namely, that Access was entitled to occupy the premises rent free only from June 1 to August 1, 2022, and only once it satisfied the conditions of clause 4. Access may have subjectively believed it was entitled to two months' rent free from whatever date it entered into possession of the premises but that is not what the agreement states and is not what was agreed as between the parties.

[72] I do not understand the defendants to seriously dispute that they are in breach of the agreement if it is interpreted in the manner I have. However, for sake of completeness, I now address the various conditions of clause 4, when they were satisfied and the defendants' wrongful termination of the agreement. The conditions were:

1. that the parties removed their respective conditions precedent "herein";
2. that the landlord provided its written consent to the sublease;
3. that the deposit had been paid; and
4. that proof of insurance had been provided to the sublandlord.

[73] The first condition was in reference to the conditions precedent of the sublease set out in clauses 15 and 16 of the sublease. These conditions precedent were removed on May 17, 2022.

[74] The second condition, the obtaining of the landlord's consent to the sublease, is a clear and unambiguous reference to the need for the head landlord to consent to the sublease as required by clause 17 of the sublease. This condition was satisfied verbally on June 17, 2022 and in writing on June 21, 2022.

[75] The third condition was in reference to the deposit as required by clause 18 of the sublease. This condition was satisfied on May 20, 2022. I again note that I have

rejected Mr. Singh's evidence that the deposit was paid because of an assurance/warranty of the plaintiff that the landlord would approve the sublease in a timely fashion.

[76] The fourth and final condition, that proof of insurance be provided, is a reference to clause 11 of the sublease. This condition was not satisfied until July 18, 2022.

[77] Therefore, pursuant to clause 4 of the sublease, Access was not entitled to early occupancy of the premises until July 18, 2022, the same date it was invited to pick up the key.

[78] I note that the parties have made submissions about who was responsible for the delay in satisfying the various conditions of clause 4, but have not characterized the delays as breaches of a duty of good faith performance or a failure to act reasonably. Nevertheless, based on the evidence before me, I have no hesitation in finding that the plaintiff is not responsible for the delay in obtaining the head landlord's approval or for the delay in obtaining the proof of insurance. The delay in obtaining proof of insurance was entirely the fault of the defendants. They knew from that date of signing the agreement that they required proof of insurance, however, they did not take steps to obtain that insurance until July 4 when they were reminded of the need for insurance by Mr. Oteman. They did not satisfy this condition until July 18. The delay was entirely the fault of the defendants.

[79] Given my interpretation of the sublease agreement, it follows that Access wrongfully purported to terminate the agreement on August 30, 2022.

Indemnity

[80] The plaintiff also submits that Quantum agreed to indemnify it for any losses caused by Access' breach of the sublease and that Access and Quantum are, accordingly, jointly and severally liable.

[81] The plaintiff refers me to *Salminen v. Garvie*, 2011 BCSC 339, a case that addressed subsequent conduct and further negotiations following an alleged completed agreement. Justice Williams set out many of the applicable principles at paras. 29-33, of which paras. 32-33 are particularly apt.

[32] Where the alleged agreement contemplates the execution of a further formal contract or where, as here, further negotiations take place after the conclusion of the alleged agreement, the court must determine whether the parties intended to create a binding contract or simply reached a basis for future agreement: *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at para. 329, [2009] B.C.J. No. 1900 (QL) [*Le Soleil*]. It is trite law that “an agreement between two parties to enter into an agreement by which some critical part of the contract matter is left to be determined is no contract at all”: *May & Butcher Ltd. v. The King*, [1929] All E.R. Rep. 679, [1934] 2 K.B. 17 (H.L.), at 20.

[33] The question for the court is whether the parties reached an agreement on all matters that are vital to that agreement or merely intended to defer legal obligation until a final agreement has been reached: see, for example, *Boult Enterprises Ltd. v. Bissett* (1985), 1985 CanLII 260 (BC CA), 67 B.C.L.R. 273, [1985] B.C.J. No. 1872 (QL) at para. 13. In *Le Soleil* at para. 333, Dickson J. said this:

In some cases where execution of a formal contract is contemplated, a draft contract containing additional or different contractual terms may be produced and delivered. In such circumstances, if the court is satisfied, on an objective analysis, that all essential terms were agreed and the new terms do not amount to a repudiation or admission that no agreement was reached earlier, the agreement will be binding: *Perry v. Suffields Ltd.*, [1916] 2 Ch. 187 (C.A.); *Horsnail v. Shute* (1919), 27 B.C.R. 474 (C.A.); *Klemke Mining Corporation... [v. Shell Canada Ltd.]*, 2007 ABQB 176, aff'd 2008 ABCA 257 (CanLII); *Lake Ontario Cement Co. v. Golden Eagle Oil Co. Ltd.*, (1974), 1974 CanLII 742 (ON SC), 46 D.L.R. (3d) 659. On the other hand, if the Court concludes that key terms remained open for negotiation an intention to be create legal relations will not be found: "*Bay Ridge*" (*The*), [1999] 2 Ll.L. Rep 277; *Pitt Air Ltd. v. Pitt Meadows Airport Society*, 2006 BCSC 1230 (CanLII), [2006] B.C.J. No. 1870, 2006 CarwellBC 2031 (S.C.), affirmed [2007] B.C.J. No. 36, 2007 CarswellBC 34 (C.A.); *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 1991 CanLII 2734 (ON CA), 79 D.L.R. (4th) 97 (Ont. C.A.).

[82] Put simply, the question is whether the parties reached an agreement on all matters that are vital to that agreement or merely intended to defer legal obligation until a final agreement has been reached.

[83] The plaintiff relies on the first sentence of the indemnity clause which, after reciting the consideration, provides that Quantum “agrees to indemnify the Sublandlord for the due performance of all of the covenants and agreements of the Subtenant”.

[84] The defendants rely on the second sentence of the indemnity clause which requires that Quantum “execute and deliver ... an agreement in form satisfactory to the Sublandlord confirming such indemnity”. The defendants say that this renders the indemnity a mere agreement to agree.

[85] I again agree with the plaintiff and disagree with the defendants. The first sentence of the indemnity clause is a clear and unequivocal agreement to indemnify. The use of the word “agreement” in the second sentence is unfortunate as it does suggest the parties will execute a separate agreement. However, it is wrong to focus on the word “agreement” in isolation, as the defendants do. The second sentence refers to “an agreement ... confirming such indemnity”. Read in context, the second sentence is merely a requirement that Quantum provide a separate document confirming the indemnity given in the first sentence. Accordingly, in my view, the latter part of the indemnity clause does not detract from the clear words of indemnity in the first sentence.

Damages, Interest and Costs

[86] The plaintiff says it is entitled to damages of \$280,933.23, being the basic rent plus the proportionate share of additional rent, less the amount of the deposit and the August rent paid. Additionally, the plaintiff claims interest at the rate of 24% per annum and solicitor-client costs, as set out in the terms of the Head Lease and which were incorporated by reference into the sublease agreement.

[87] The defendants made no submissions challenging the plaintiff’s quantification of its damages or challenging its entitlement to contractual interest and contractual solicitor-client costs.

[88] I accept the plaintiff's calculation of damages as presented and accept that it is entitled to contractual interest and contractual solicitor-client costs based on the incorporated clauses of the Head Lease.

[89] At the hearing before me, the defendants properly conceded that the relisting of the premises by the plaintiff was sufficient mitigation. I therefore need not consider mitigation further except to say that the defendants clearly did not satisfy the onus on them of proving on a balance of probabilities that the plaintiff failed to mitigate.

Order

[90] Accordingly, the plaintiff is entitled to:

- a) judgment against the defendants jointly and severally in the amount of \$280,933.23;
- b) contractual interest at the rate of 24% per annum on each overdue rent payment from the due date of the payment to the date of payment; and
- c) its costs of this action to be assessed on a solicitor-client basis.

[91] The counterclaim is dismissed.

"Giaschi J."