CITATION: *Subramaniam v. Metamore Inc.*, 2024 ONSC 1189
COURT FILE NO.: CV-23-00000043-0000
DATE: 2024/02/26

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:		)	
JEYAKUMAR SUBRAMANIAM and J K EATS & PUB INC.	Applicants	)	*Noel Gerry*, for the Applicants
– and –		)	
METAMORE INC.	Respondent	)	*Mark Pedersen*, for the Respondent
		)	**HEARD** at Napanee by videoconference**:** February 9, 2024

K. MCVEY J.

DECISION

Introduction

[1] Jeyakumar Subramaniam is the sole shareholder, director and officer of the corporate Applicant, J K Eats & Pub Inc. Mr. Subramaniam, in trust for a company to be incorporated (now the corporate Applicant) as tenant, and the Respondent landlord executed a five-year lease agreement on July 5, 2023. The Applicants intended to open a restaurant in one of the units of a lowrise shopping plaza owned by the Respondent at 824 Palace Road, Napanee, Ontario ("the Premises").

[2] A dispute arose between the parties in September 2023, culminating in the Respondent locking the Applicants out of the Premises. The Applicants seek reinstatement of the tenancy on the basis that the Respondent did not comply with section 19(2) of the *Commercial Tenancies Act*, R.S.O. 1990, c. L.7 ("*CTA*"), rendering the Respondent's termination of the lease unlawful. In the alternative, the Applicants seek relief from forfeiture pursuant to section 20(1) of the *CTA*.

[3] For the following reasons, I find that the Respondent failed to comply with s. 19(2) of the *CTA*. Therefore, its termination of the lease was unlawful. Even had I found the notice of default sufficient, I would have granted relief from forfeiture pursuant to section 20(1) of the *CTA* and reinstated the lease.

Background

[4] The prior tenant of the Premises also operated a restaurant at the location and in May 2023 owed the Respondent arrears in rent. Mr. Subramaniam met the prior tenant in May 2023 and the two discussed the potential purchase of the restaurant. In June 2023, the prior tenant introduced Mr. Subramaniam to a director of Metamore Inc., Jason Coughlin. The parties agreed that Mr. Subramaniam (through a company to be incorporated by him) would pay $80,000 for the chattels already onsite owned by the prior tenant (*e.g.*, ovens, sinks, ice machines, etc.) and enter into a fiveyear lease agreement with the Respondent with the intention of operating a new restaurant at the Premises.

[5] On July 5, 2023, Mr. Subramaniam paid $50,735.00 to the Respondent. This constituted payment for the first and last months' rent, and half of the amount owed for the chattels. The other half of the purchase price for the chattels was paid directly to the prior tenant.

[6] Between July 5, 2023, and September 1, 2023, the Applicants prepared to open their new restaurant. They spent a total of $95,332.96 on inventory, decorating, general clean-up, repairs, and new equipment. The Applicants hired six new employees and anticipated hiring eleven others. During this preliminary period of preparation, no disputes arose between the Applicants and agents for the Respondent.

The Alleged Incident

[7] The Applicants planned to open the restaurant on September 2, 2023. In the early morning hours of September 2, 2023, technicians were on-site finishing the installation of a point-of-sale system. The Applicants' head cook was also on-site supposedly making final preparations for the food service. Mr. Subramaniam was not present.

[8] At approximately 2:30am, Mr. Subramaniam received a phone call from an individual named Wade Ennis. Mr. Subramaniam later came to learn that Mr. Ennis resided in an apartment on the second floor of the plaza and was an employee of the Respondent.

[9] Mr. Ennis was angry and advised Mr. Subramaniam that a drunken disturbance at the Premises had woken him up. According to Mr. Subramaniam, Mr. Ennis hung up before he could respond.

[10] When Mr. Subramaniam woke up in the morning, he saw that an MMS group message had been sent by Mr. Ennis at 3:22am in the morning. The MMS group was comprised of Mr. Ennis, Mr. Coughlin, and Mr. Subramaniam. The message read as follows:

> The restaurant has broken many parts of its lease now, we will not be allowing anyone else on site legally until a meeting has been held between JR, Jason Coughlin and Wade Ennis.
>
> Because we are now up all night and you're [sic] drunk, stoned staff have kept us up. We will meet with you Tuesday. Until then no one is to be on the premises or the OPP will be called.
>
> All the proceedings that took place here between midnight and 3:22am have all been documented and recorded on video.
>
> The grey haired man was so drunk he isn't ever [sic]

[11] Mr. Ennis did not articulate which covenant of the lease the Applicants had purportedly breached. Mr. Subramaniam responded with the following message at 7:38am:

> Good morning Fistful [sic] sorry this morning was very very bad thing happened. Yes we have sit down for meeting. I ask myself there is the… stools and …thighs are very important in the Restaurant please let me take out meat and the T.v guys. I will be around 10s. Please and thank.

[12] Mr. Ennis responded with the following message:

> You can grab it but that Greg haired man isn't welcome here again. *Grey

[13] Mr. Subramaniam thanked Mr. Ennis and then attended the Premises later that morning with his son and restaurant manager. He immediately noticed a water leak. At 11:13am, Mr. Subramaniam wrote the following on the group chat:

> Hi, we're at the restaurant right now. Just wanted to let you know that we think there's a water leak coming from upstairs. It's clear water, so it's not coming from our own water drainage. We're also waiting for the T.v guys to come by and pick up their tools.

[14] Mr. Ennis responded with the following message:

> That's not an excuse! I'll have a plumber come but you have till noon.
> Jay and I are prepared to call the AGCO and OPP Last night was absolutely insane.

[15] At 1:07pm, Mr. Subramaniam wrote:

> I am waiting for the T.V people came to get it. They are on the way from Toronto.

[16] At 2:59pm, Mr. Subramaniam's son who is more fluent in English began to communicate on his father's behalf on the group chat. He wrote the following:

> Good day Jay and Wade,
>
> This is Pirana, JR's son. I am currently in Napanee helping out with matters at the restaurant. I'd like to first apologize for any noise and disturbance caused last night, it was unacceptable and we are taking serious measures to deal with the offending

> person to ensure a situation like this does not occur again. Would it be possible to have the meeting on an earlier date. If that is not possible, we kindly ask if you could allow 2-3 people to help clean up and set the restaurant up for the Grand Opening (of course the Grey haired fella will not be allowed until we have spoken about …will be there to supervise while the restaurant is being set up. Thank you for your understanding.
>
> Pirana

[17] Neither Mr. Ennis nor Mr. Coughlin responded.

[18] At approximately 4:30pm, the power went out inside the Premises. Mr. Subramaniam and his son went outside where Mr. Ennis and Mr. Coughlin were present. Mr. Ennis did not wish to speak with Mr. Subramaniam. He told Mr. Subramaniam's son, Piranavan, to "fuck off." Piranavan pleaded with Mr. Ennis and Mr. Coughlin to turn the power back on to avoid spoiling the refrigerated and frozen food inventory. Mr. Ennis advised them that he would turn the power back on if they left the Premises.

[19] Mr. Subramaniam sent the following message at 5:03pm and then he and his son left the unit as directed:

> Thank you for your understanding, we're currently moving the TVs out and leaving. We'll be out in 35mins. Of course we'll meet back on the Tuesday morning. Thanks again.
> JR

[20] Mr. Subramaniam did not attend his restaurant for the remainder of the weekend. He followed up with Mr. Ennis and Mr. Coughlin on September 4 at 12:47pm about their upcoming meeting:

> Good morning, What time and where we will have our meeting tomorrow?

[21] He received the following response from Mr. Coughlin:

> JR we will be meeting with the lawyer in the am and will call you after that meeting to arrange a time for us to sit down to discuss moving forward. Until then no access to the property will be permitted. This has been a major issue and concern company wide and the other partners have now been notified of the situation. I will call you directly before noon on Tuesday to decide on a reasonable time to meet.

[22] Mr. Subramaniam thanked Mr. Coughlin for his response and asked to be kept updated on any scheduling developments.

[23] The next day, on September 5, 2023, Mr. Coughlin followed up with Mr. Subramaniam via the MMS group chat:

> We will bs [sic] in touch shortly after our am meetings. Please keep in mind that Chef KC is not welcome on the property. He will be trespassed if he comes onto the property.

[24] Mr. Subramaniam responded with the following message:

> Ok, please let me know when the meeting will be set. Also please bear in mind that I will not have time to meet anytime tomorrow. I have to help my son move. he [sic] is starting University tomorrow.

[25] Mr. Coughlin responded and advised that the meeting would be held in the afternoon and that he would provide more definitive details later in the day. Once again, Mr. Subramaniam explicitly thanked Mr. Coughlin for his response and asked if his son, Piranavan, and restaurant manager, Suji, could attend the meeting.

[26] Mr. Coughlin responded with the following message:

> Suji your chef??
> JR let me be very clear. KC or Suji or whatever your chef/manager's name was that was here and intoxicated the other night is not now nor will he ever be welcome on this property again. If he does we will have him removed and served with a.. That ship has sailed. His behaviour has not only tarnished the relationship between yourself and your landlord. It has jeopardized your lease and put us off of ever allowing a licensed establishment on the premises ever again.

[27] Mr. Subramaniam clarified that Suji was his nephew, not the chef, and that his nephew had not been present during the alleged disturbance. Mr. Coughlin responded with the following:

> I would not bring your manager…no

[28] At approximately 1:40pm, Mr. Coughlin updated Mr. Subramaniam regarding the meeting:

> JR we are awaiting a new agreement from our lawyers. You are unavailable tomorrow and Metamore is. [sic] closed the remainder of the week for Wade's wedding. I suggest we get together on Monday morning and we will go over the covenants of your lease and the new agreement so there is no more issues. At that time once the amendment of covenant I signed we will return access to the unit to you. Because of the breach of multiple covenants of the lease and the amendment [sic] we are left with a choice to either terminate the lease or proceed with a new agreement.
>
> It also needs to be clear that chef KC will not be allowed to return to the property under promise of trespass at any point.

[29] On September 7, 2023, Mr. Subramaniam attended the Premises to check on his inventory given that he had not yet met with agents for the Respondent. He understood that the lease was still in effect. When he arrived, he found a chain on the door preventing entry. No notice of default or termination was posted on the Premises. Later that evening, in the company of a friend, Mr.

Subramaniam broke the chain and entered his restaurant.

[30] At 9:10pm, Mr. Coughlin, Mr. Ennis, and an unknown male and female entered the Premises and told Mr. Subramaniam that he had to leave. Mr. Subramaniam responded that the lease was still valid. Mr. Subramaniam alleges that Mr. Coughlin began pushing him and that Mr. Ennis threw a case of beer on the ground. A photo of the smashed beer bottles was appended as an exhibit to Mr.

Subramaniam's affidavit.

[31] Mr. Ennis then called the police. Mr. Subramaniam spoke with the police when they arrived and advised them that he would leave the Premises by 11:00pm.

[32] Mr. Subramaniam returned to the Premises at 11:00am the following day. The locks had been changed and, *for the first time*, a notice of default and a notice of termination were posted on the front and side doors.

[33] The notice of termination was dated September 8, 2023. The notice of default was dated September 5, 2023, despite never having been provided prior to September 8, 2023. The notice of default alleged the following breaches of the lease:

1) That the Tenant operated the Premises past the permitted hours of operation;

2) That the Tenant failed to follow the laws and guidelines for licensed establishments namely serving and permitting consumption of alcohol outside of legal licensed hours, permitting overserving and public intoxication among other items.

3) That the Tenant operated the premises to be a nuisance to other occupants and residents

[34] The notice of default concluded with the following paragraph:

> TAKE NOTICE any **further** default or conduct similar to the above will result in immediate termination of the Lease by way of changing of the locks without any **further** notice. No **further** indulgence shall be granted. [emphasis added]

[35] In oral argument, counsel for the Respondent advised the Court that the only breach now alleged was that the Applicants failed to follow the laws and guidelines for licensed establishments, the second enumerated breach set out above.

[36] After reading the posted notices, the Applicants filed a police report and subsequently retained a lawyer.

Lawfulness of Termination

[37] A right of re-entry or forfeiture of a lease for breach of any covenant or condition, other than one in respect of the payment of rent, is not enforceable unless notice is first given in compliance with section 19(2) of the *CTA*:

> **Content of notice**
> (2) A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease, other than a proviso in respect of the payment of rent, is not enforceable by action, entry, or otherwise, unless the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach.

[38] The language of the section is clear and mandatory (*780046 Ontario Inc. v. Columbus Medical Arts Building Inc*., [1994] O.J. No. 2282 (C.A.), at paras 23, 27):

> Notice is a protection to the tenant. Its purpose is to warn the tenant that its leasehold interest is at risk and to give the tenant an opportunity to preserve that interest by remedying the breaches complained of and, where necessary by compensating the landlord. Because courts have not looked favourably upon the remedies of re-entry, forfeiture, **and termination they have insisted that landlords strictly comply with the notice requirement in s. 19(2) of the Act** [citations omitted].
>
> **…**
>
> The express language of s. 19(2) indicates that if a landlord proposes to exercise a contractual right of re-entry for breach of a covenant other than a covenant to pay rent, prior notice is mandatory. Judicial authority both in England and in Ontario confirms that a re-entry effected without notice is invalid. [Emphasis added.]

[39] A valid notice under the *CTA* must specify *the particular breach* complained of; require the lessee to remedy the breach, if possible; require the lessee to make compensation in money for the breach, if it cannot be remedied; and provide the lessee reasonable time to remedy the breach, if it is capable of remedy, or to make reasonable compensation in money to the satisfaction of the lessor, if it is not (see *Dasham Carriers Inc. v Gerlach*, 2012 ONSC 4797, at para 33). A tenant must be given the opportunity to remedy a breach, if possible, even where the breach is fundamental in nature (*Dasham Carriers Inc*., at para 34).

Alleged Breach

[40] The first issue that must be determined is whether the Applicants breached a condition of the lease. The Respondent asserts that the Applicants breached the following term set out in the Amendment to Lease signed by the parties on July 5, 2023:

> 2. The Tenant at all times shall follow the laws and guidelines laid out for Licensed establishments by the AGCO, LCBO and all other alcohol licensing and regulating bodies. Especially, but not limited to, those pertaining to responsible service of alcohol. Failure to do so could result in the immediate termination of this lease at the Landlord's discretion.

[41] There are *very few* details before this Court regarding what actually occurred in the early morning hours of September 2, 2023. The only evidence on this point is found within Mr. Coughlin's affidavit and cross-examination. The totality of the evidence is that the "employees and contractors…were consuming large amounts of alcohol, smoking cannabis, playing music at extremely loud volumes, and yelling at one another in the Unit and in the parking lot on the Property"; that the "grey haired man was so drunk"; that the following day there were "broken lawn chairs laying in front of the restaurant"; and that the problematic employee was "belligerent" with Mr. Ennis.

[42] In his affidavit, Mr. Coughlin does not indicate the source of his information and belief. He was not present when the alleged incident occurred. I presume that Mr. Ennis advised Mr. Coughlin of this information since Mr. Coughlin confirmed in his cross-examination that Mr. Ennis was the only individual present at the location at the time. But that is not explicitly set out in his affidavit. Mr. Ennis, the individual who ostensibly drew conclusions regarding the state of sobriety of the Applicants' staff members, did not provide evidence on this Application.

[43] In addition, Mr. Coughlin's affidavit does not detail what *direct* observations Mr. Ennis made, if any, regarding alcohol consumption at the Premises. Did Mr. Ennis observe the Applicants' staff consuming alcohol and cannabis or is that an inference he drew? If Mr. Ennis drew an inference, what indicia of impairment did he observe or overhear to make him believe that an employee was intoxicated? Without that information, this Court cannot assess

the strength of any inference drawn. This Court is not even sure whether Mr. Ennis observed the staff at all, or whether he simply overheard them.

[44] In oral argument, when asked by the Court, counsel for the Respondent indicated that no *particular* guideline or law had been breached by the Applicants, but that the lease was breached when their staff member committed the offence of public intoxication.

[45] Again, the sum total of the evidence on this point is the hearsay evidence of Mr. Coughlin about Mr. Ennis' conclusions. This is problematic. One would reasonably think that if a commercial landlord wished to terminate a five-year lease in its infancy due to a problematic incident amounting to a foundational breach of the lease, that details of the incident would be provided to the Applicants, and certainly to the Court in the context of litigation. On the evidentiary record before me, I have insufficient evidence to even find that the Applicants breached the lease.

[46] I would declare that the lease remains in full force and effect on that basis alone.

[47] Nonetheless, I will go on to consider the lawfulness of the termination *presuming* that conduct occurred amounting to public intoxication and a breach of the lease. To that end, I must assess whether the Respondent complied with s. 19(2) of the *CTA* such that it could lawfully reenter the Premises.

Text Message on September 2, 2023

[48] The Respondent argues that the following text message sent from Mr. Ennis at 3:22am constitutes sufficient notice pursuant to s. 19(2) of the *CTA*:

> The restaurant has broken many parts of its lease now, we will not be allowing anyone else on site legally until a meeting has been held between JR, Jason Coughlin and Wade Ennis.
>
> Because we are now up all night and you're [sic] drunk, stoned staff have kept us up. We will meet with you Tuesday. Until then no one is to be on the premises, or the OPP will be called.

> All the proceedings that took place here between midnight and 3:22am have all been documented and recorded on video.
>
> The grey haired man was so drunk he isn't ever.

[49] This purported notice is woefully deficient. First, it fails to adequately set out the nature of the alleged breach. At best, it informs the Applicants that their "drunk, stoned staff" kept Mr. Ennis up at night, and perhaps other unidentified individuals as well. It does not indicate what term of the lease had been breached. In addition, it is bereft of details about what exactly occurred.

[50] Second, the notice fails to communicate how the Applicants can remedy the breach. The Respondent argues that this is not fatal because the breach could not be remedied in the circumstances. I disagree. In fact, based on their own conduct, as I will explain, agents for the Respondent believed the breach *could* be remedied, which is why they invited further dialogue with the Applicants and did not immediately advise that the lease had been terminated.

[51] Regarding the remedial nature of the breach, this incident did not occur during normal operational hours where inherent concerns regarding reoccurrence arise due to the nature of the business. The Applicants' staff had been at the Premises for the better part of two months getting ready to open the restaurant and this was the sole incident that had occurred. It was an isolated event allegedly committed by one identifiable individual. Termination of the problematic employee could have satisfactorily remedied the breach. Indeed, the Respondent asked for exactly that and Mr. Subramaniam expressed no opposition to it.

[52] Both Mr. Ennis and Mr. Coughlin implicitly and explicitly communicated to Mr. Subramaniam that the breach could be remedied. First, they do not initially advise him that the lease had been terminated. Instead, they indicate that they wish to meet with him to discuss how they will move forward. In his cross-examination, Mr. Coughlin acknowledged that they wished to discuss an "agreement" with the Applicants to ensure that nothing similar happened again.

[53] Second, in their group MMS exchange on September 4, 2023, two days after the alleged incident, Mr. Ennis and Mr. Coughlin, on behalf of the Respondent, again indicate that they wish to "sit down to discuss *moving forward*" (emphasis added). They later indicate via text message that the incident "has tarnished the relationship" between the Applicants and their landlord. They do not say the incident severed the relationship. They speak of the relationship as though it had persevered.

[54] Third, Mr. Ennis and Mr. Coughlin indicate via text message that the incident "jeopardized" the Applicants' lease. They do not indicate that it has been terminated.

[55] Fourth, they later advise the Applicants that they will meet on Monday to "go over the covenants of your lease". They refer to the lease in the present tense as though it is still active. In the same message, they refer to the signing of a potential "amendment of covenant" to ensure there are "no more issues".

[56] Finally, they advise the Applicants that "chef KC will not be allowed to return to the property". That implicitly conveys that the lease is continuing.

[57] All these communications suggest an ongoing relationship on certain conditions, not the termination of the agreement as of September 2, 2023. Agents for the Respondent understood that the breach *could* be remedied. Yet none of the potential remedies are set out in the purported notice dated 3:22am on September 2, 2023.

[58] Given that the notice was deficient, the Respondent had no lawful basis to ban the Applicants from the Premises by placing a chain on the door. The Respondent also had no lawful authority to cut power off to the unit. As a result, Mr. Subramaniam did not "break in" to the Premises, as repeatedly suggested by the Respondent, when he cut the chain link and entered the restaurant. As the principal of a rent-paying tenant, he was perfectly entitled to be there.

Notice Posted on September 8, 2023

[59] In the alternative, the Respondent argues that the second notice posted on the door on September 8, 2023, was sufficient notice of default. This notice was also deficient. Though

it was dated September 5, 2023, it was not served on the Applicants until September 8, 2023. I find that the Respondent served this notice on the Applicants at the same time as the notice of termination.

[60] The notice concludes with the following:

> TAKE NOTICE any further default or conduct similar to the above will result in immediate termination of the Lease by way of changing of the locks without any further notice. No further indulgence shall be granted.

[61] The notice indicates that the locks will be changed *if* there is a "further default" and that no "further" indulgence shall be granted. There was no *further* breach of the lease, presuming one occurred at all, after the incident on September 2, 2023, or after this notice was served that would justify a subsequent termination.

[62] A notice that purports to allow a tenant to remedy a breach, as was done here by referring to "*further*" defaults, "*further* indulgence", and *future* termination should similar conduct re-occur, cannot be posted simultaneously with a notice of termination. A tenant is entitled to a reasonable opportunity to remedy an alleged breach. Certainly, the Applicants' *lawful* attempts between September 5 and September 8 to access property in respect of which they paid rent could not constitute "further defaults" within the meaning of the notice.

[63] In conclusion, the Respondent did not comply with s. 19(2) of the *CTA*. Its re-entry of the Premises was therefore invalid and the lease between the parties is still in full force and effect.

Relief from Forfeiture

[64] Given my finding that the termination of the lease by the Respondent was unlawful, the Applicants need not avail themselves of relief from forfeiture. With that said, if I am found to be in error regarding the lawfulness of the Respondent's re-entry, I would have granted the Applicant relief from forfeiture pursuant to section 20 of the *CTA*.

[65] Relief from forfeiture pursuant to section 20 of the *CTA* is an equitable remedy that serves as a shield to protect a tenant, in appropriate circumstances, from termination of a lease in the face of a proven violation. Section 20 permits a court to provide relief where termination would visit inequity on the tenant given the nature and circumstances of the proven breach. A tenant cannot rely on relief from forfeiture, however, to effectively re-write the commercial bargain previously negotiated between the parties: *Hudson's Bay Company ULC v Oxford Properties Retail Holdings II Inc*., 2022 ONCA 585, at para 42.

[66] When considering whether to exercise its discretion to grant relief from forfeiture, courts may consider the conduct of the parties, including whether the breach was deliberate, the gravity of the breach, and the relative impact on the parties of either granting or refusing the request: *Hudson's Bay Company*, at para 36; *Saskatchewan River Bungalows v Maritime Life Assurance Co*., [1994] 2 S.C.R. 490, at para 32; and *Westdale Construction Co. Ltd v Hui Ying Coa*, 2009 CanLII 41544. Courts must also consider whether forfeiture would be disproportional to the harm suffered by the landlord as a result of the breach: *116531 Canada Inc. v 569562 Ontario Inc.*, [1988] O.J. No. 261.

[67] Though this remedy is granted sparingly, extending it to the Applicants is appropriate for the following reasons. First, this was not a wilful or intentional breach. There is no indication that Mr. Subramaniam was aware of what was transpiring at the Premises in the early morning hours of September 2, 2023. Nor is there any indication that he condoned the conduct after-the-fact. Rather, Mr. Subramaniam immediately apologized in the morning and stressed that he would deal with the offending employee. He was fully cooperative when agents for the Respondent advised him that the "grey haired man" would no longer be welcome on the Premises.

[68] Second, the breach was not related to the operation of the Applicants' restaurant *per se*. The breach was not driven by the type of business conducted by the Applicants such that concerns of reoccurrence arise. There is no basis to believe that a similar incident will occur again, given that the alleged incident was caused by a rogue employee who no longer works for the Applicants. The Applicants had been in possession of the property for almost two months before the alleged incident and no issues had arisen.

[69] Third, Mr. Subramaniam immediately acquiesced to the limitations that the Respondent unlawfully placed on his ability to access the Premises. Mr. Subramaniam was collaborative and cooperative.

[70] Fourth, through its agents, the Respondent conducted itself in a heavy-handed, disproportional, and aggressive manner. The Respondent unlawfully placed a chain on the door of the Premises preventing lawful access by a commercial tenant. They did so without complying with section 19(2) of the *CTA* and ostensibly based on a text message sent at 3:22am in the morning that was bereft of any meaningful details about what had occurred the night before. At best, this was unprofessional and intimidatory behaviour on the part of an experienced commercial landlord.

[71] Fifth, when Mr. Subramaniam politely raised concerns about his inventory, the Respondent turned the power off and refused to turn it back on until Mr. Subramaniam agreed to leave the Premises. When Mr. Subramaniam returned to the Premises days later to *lawfully* check on his property, agents for the Respondent aggressively confronted him and intentionally smashed a case of beer on the floor. This was outrageous conduct given that, at the time, Mr. Subramaniam had every right to be at the Premises.

[72] Sixth, there is no evidence that the Respondent suffered any financial harm relating to the incident. There was no property damage. Nor is there any detailed evidence about anyone other than Mr. Ennis having been inconvenienced by what allegedly occurred. That is not to say that the incident was not serious or that it was unreasonable for the Respondent to be concerned. But there is no compelling evidence that the incident impacted other commercial tenants at the location. Indeed, the main tenant is a daycare which surely would not have been operational when the disturbance took place.

[73] Seventh, terminating a five-year commercial lease at the two-month mark due to an isolated incident that caused no monetary loss or other injury to the Respondent is overtly disproportional. The Respondent will not be prejudiced by reinstatement of the lease. However, the Applicants will suffer significant financial loss if the lease were terminated. The Applicants invested over $90,000 to ready the Premises for business, and the Applicants purchased $80,000 worth of chattels from the

prior tenant for the purpose of opening a restaurant *at that location*. In addition, the Respondent indirectly benefited from the sale of the chattels because the sale permitted its prior tenant to pay off his arrears in rent.

[74] The Respondent argues that granting relief from forfeiture in these circumstances is akin to recalibrating the contractual rights of the parties. I disagree. The terms of the lease will mirror exactly those that the parties negotiated in July 2023. Nothing will change. The Respondent relies on *Hudson's Bay* in support of his position. That case is distinguishable. There, Hudson's Bay Company sought to pay less rent than that which was negotiated under the lease because, in its view, equity demanded that its landlord share in the financial losses wrought by the pandemic. The Court of Appeal found that such relief was unavailable because changing the amount of rent owed under a lease agreement alters a basic and fundamental term of the contract.

[75] Granting relief from forfeiture in the present matter does nothing of the sort. If the Applicants breach the lease a second time in a similar fashion, there is nothing preventing the Respondent from taking appropriate action provided it complies with its obligations under the *CTA*. A similar result was reached in *Westdale Construction Co. Ltd*. There, the tenant repeatedly breached the lease. It permitted its patrons to loiter on the common sidewalk to the detriment of other commercial tenants of the shopping center. The tenant also breached the *Liquor Licence Act*, in contravention of the lease agreement. Nonetheless, the Court granted relief from forfeiture given the disproportionate impact that termination would have on the tenant.

[76] Finally, the Respondent argues that relief from forfeiture should be denied to the Applicants because they do not appear before the Court with "clean hands" given that Mr. Subramaniam engaged the police regarding a civil dispute. I reject this argument. It was the Respondent who initially threatened to contact police, not just once but three times. On September 2, 2023, in his initial MMS message, Mr. Ennis threatened to contact the OPP if the Applicants attended the Premises despite the Applicants maintaining a valid lease; later that same day, Mr. Ennis again threatened to contact the OPP if Mr. Subramaniam did not leave the premises; and, finally, it was Mr. Ennis who called the police when Mr. Subramaniam attended the Premises on September 7, 2023, to lawfully check on the inventory.

Conclusion

[77] The Applicants are entitled to (a) a declaration that the lease remains in full force and effect; and (b) an order requiring the Respondent to restore all goods and chattels situated in the Premises, and an order preventing any sale, disposition, disposal or distress from being made.

[78] The Applicants shall be given immediate and unfettered access to the Premises.

[79] The lease agreement provided for three months of free rent at the outset of the lease. The Applicants paid first and last month's rent when the lease agreement was executed on July 5, 2023.

The first monthly payment of rent would therefore have been attributed to October 2023. Therefore, the Applicants paid rent for the month of October but did not have access to the Premises. In addition, they were entitled to a third free month of rent, which ought to have been September 2023, though they were precluded from accessing the Premises for effectively that entire month. The Respondent shall therefore credit the Applicants for two months of rent.

[80] Second, the Applicants will not be able to immediately open their restaurant upon the release of these reasons. The interruption in their lawful access on the verge of the restaurant's grand opening was the fault of the Respondent. The Applicants are therefore awarded further damages in the equivalent of two months' worth of rent to account for the time it may take to rehire staff, purchase inventory, and ready the Premises for opening.

[81] Third, no rent is otherwise due from the Applicants during the period between September 2, 2023, and the release of these reasons given that they did not enjoy access to the Premises.

[82] For the avoidance of doubt, no further rent will be due under the lease until two months after the delivery of these reasons, at which time the Applicants' rent payment obligations shall resume in accordance with the lease. In the meantime, the Respondent is to pay the

Applicants damages in the amount of $10,735 (two months' rent at $4,750 per month plus HST).

[83] Punitive damages were sought by the Applicants but not actively pursued in oral or written argument. In any event, despite the high-handed conduct of the Respondent, in my view, the compensatory damages set out above combined with the reinstatement of the lease convey an adequate denunciatory and deterrent message. No punitive damages will be awarded.

Costs

[84] The parties did not make submissions on costs. The Applicants are the successful parties and are presumptively entitled to costs. They shall have ten days from the release of these reasons to file their costs submissions. The Respondent shall have ten days to respond. There will be no reply without leave of the Court.

Justice K. McVey

Date: February 26, 2024

CITATION: *Subramaniam v. Metamore Inc*., 2024 ONSC 1189
COURT FILE NO.: CV-23-00000043-0000
DATE: 2024/02/26

ONTARIO

SUPERIOR COURT OF JUSTICE

RE: Jeyakumar Subramaniam and J K Eats & Pub Inc., Applicants

– and –

Metamore Inc., Respondent

DECISION

McVey J.

Released: February 26, 2024